83-951

Office - Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
of Wisconsin

Attorneys for Petitioners

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

I. Where there has been compliance with state law requiring monthly benefit grants to be determined and paid by a specified date, does any injunction entered after that date which purports to require the payment of benefits for a

portion of that month violate the Eleventh Amendment.

II. Whether an unappealed order initially granting preliminary injunctive relief was improperly employed to bar consideration of the State's appellate claim that no benefits should have been awarded for the period subsequent to the date of entry of that injunction.

PARTIES

Petitioners, Donald E. Percy, Bernard J. Stumbras and Kenneth Rentmeester are state officials ("the State") sued individually and in their official capacities with respect to their administration of welfare benefits which must be paid from the state treasury.

Respondents, Geraldine Buckhanon, Melissa Pflueger, Rosetta Bailey, Mary Green and the class they represent are recipients of aid to families with

dependent children ("AFDC") and medical assistance ("MA"). Two other plaintiffs, Community Advocates and Dane County Welfare Rights Alliance, have been dismissed from this action (App. 274). See Buckhanon, 708 F.2d at 1212 (App. 114).

TABLE OF CONTENTS
AND
TABLE OF AUTHORITIES

Page

QUESTIONS PRESENTED.....1

PARTIES.....2

OPINIONS BELOW.....11

JURISDICTION.....12

CONSTITUTIONAL PROVISION INVOLVED.....12

FEDERAL STATUTE INVOLVED.....12

STATE STATUTES INVOLVED.....13

STATE ADMINISTRATIVE CODE PROVISION INVOLVED.....14

STATEMENT OF THE CASE.....16

ARGUMENT.....19

I. Where There Has Been Compliance With State Law Requiring Monthly Benefit Grants To Be Determined And Paid By A Specified Date, Any Injunction Entered After That Date Which Purports To Require The Payment Of Benefits For A Portion Of That Month Violates The Eleventh Amendment.....19

Page

A. The eleventh amendment prohibits any award of benefits when the State's liability for payment has already accrued or where no determination that the benefits sought were wrongfully withheld has been made.....19

B. The State's liability for all January benefits had already accrued by the time injunctive relief was initially granted; no determination that January benefits were wrongfully withheld was made until the June 1 order was entered.....22

II. The Unappealed Order Initially Granting Preliminary Injunctive Relief Was Improperly Employed To Bar Consideration Of The State's Appellate Claim That No Benefits Should Have Been Awarded For The Period Subsequent To The Date Of Entry Of That Injunction.....33

Page

A. An order modifying an earlier preliminary injunction is appealable as of right.....33

B. Since the orders appealed from modified a preliminary injunction, they were appealable in their entirety as of right....35

C. Even if the State had no absolute right to challenge any items addressed by the district court in its initial memorandum decision, the seventh circuit had discretion to entertain such a challenge.....37

D. The seventh circuit abused its discretion in refusing to permit the State to challenge any aspect of those items addressed by the district court in its initial memorandum decision.....39

CONCLUSION.....43

CASES CITED

Page

Baltimore Contractors v. Bodinger,
348 U.S. 176, 181 (1955).....33

Buckhanon v. Percy,
533 F. Supp. 822
(E.D. Wis. 1982).....11,16,17

Buckhanon v. Percy,
708 F.2d 1209
(7th Cir. 1983).....3,11,16,18,23,35

Burton v. Department of Health
& Social Serv.,
103 Wis. 2d 670, 309 N.W.2d 388
(Wis. App. 1981).....30

Cerro Metal Products v. Marshall,
620 F. 2d 964 (3rd Cir.
1980).....38-39

Coalition for Basic Human
Needs v. King,
654 F.2d 838 (1st Cir. 1981)...23,26

Dept. of Health v. Florida
Nursing Home Assn.,
450 U.S. 147, rehearing
denied, 451 U.S. 933 (1981).....28

Edelman v. Jordan,
415 U.S. 651 (1974).....19,20-21

Empire Nat. Bank of Clarksburg
v. Penfield Coal & Coke Co.,
354 F. 2d 873 (3rd Cir. 1966).....38

Fern v. Thorp Public School,
532 F.2d 1120 (7th Cir. 1976).....37

Page

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976).....21

Garrett v. Puett,
557 F. Supp. 9, (M.D. Tenn.
1982), aff'd per curiam,
707 F.2d 930 (6th Cir. 1983).....40

Hoots v. Com. of Pa.,
587 F.2d 1340, 1348 (3rd
Cir. 1978).....33-34

Jackson Sawmill Co. V. United States,
580 F.2d 302 (8th Cir. 1978),
cert. denied, 439 U.S.
1070 (1979).....22

Johnson v. Misericordia Community
Hosp., 97 Wis. 2d 521,
294 N.W.2d 501 (Wis. App. 1980)
aff'd, 99 Wis. 2d 708,
301 N.W.2d 156 (1981).....28

Kimble v. Solomon,
599 F.2d 599 (4th Cir. 1979),
cert. denied, 444 U.S.
950 (1980).....23,24

LeBeau v. Spirito,
703 F. 2d 639
(1st Cir. 1983).....40-41

Meeker v. Manning,
540 F. Supp. 131 (D. Conn.
1982).....27

Merrell-Nat. Labor., Inc.
v. Zenith Labor., Inc.,
579 F. 2d 786 (3rd Cir. 1978).....38

Page

Miener v. State of Mo.,
673 F.2d 969 (8th Cir. 1982).....22

Milliken v. Bradley,
433 U.S. 267 n.21 (1977).....20

New York Telephone Co. v.
Communications Wkrs. of Amer.,
445 F.2d 39, 40 (2d. Cir.
1971).....34-35

Punohu v. Sunn
666 P.2d 1135 (Hawaii 1983).....40

State of Ohio v. Madeline Marie
Nursing Homes,
694 F.2d 449 (6th Cir. 1982).....22

United States v. City of Chicago,
534 F. 2d 708 (7th Cir.
1976).....37-38

Vargas v. Trainor,
508 F.2d 485 (7th Cir. 1974),
cert. denied, 420 U.S.
1008 (1975).....23,25

WISCONSIN STATUTES CITED

Sec. 49.19, Wis. Stats. (1979-80).....13

Sec. 49.46(1)(a)1.....24

Sec. 49.46, Wis. Stats. (1979-80)...13-14

UNITED STATES CONSTITUTION

Eleventh Amendment.....12,18,19,21,25,
27,29,32,40,41,42,43

OTHER AUTHORITIES CITED

Page

28 U.S.C. § 1292.....12-13

28 U.S.C. § 1292(a)(1) (1976).....33

28 U.S.C. § 1331.....17

28 U.S.C. § 2101(c).....12

45 C.F.R. § 233.20(a)(12)(ii) (1980).....30-31

45 C.F.R. § 233.20(a)(12)(ii)(a) (1980).....30

Omnibus Budget Reconciliation Act (OBRA) of 1981.....16

Section PW-PA 20.11 Wis. Adm. Code (1980).....14-16

Section PW-PA 20.11(3) Wis. Adm. Code (1980).....27,29,30

Section PW-PA 20.11(4) Wis. Adm. Code (1980).....31

Standard Federal Tax Reports: 1984 U.S. Master Tax Guide (CCH), ¶ 611 at 215.....26-27

OPINIONS BELOW

Certiorari is sought to review a decision of the Seventh Circuit Court of Appeals: Buckhanon v. Percy, 708 F.2d 1209 (7th Cir. 1983) (App. 101-138).

The district court issued its initial decision on January 14, 1982. Buckhanon v. Percy, 533 F. Supp. 822 (E.D. Wis. 1982) (App. 139-152). It issued a second decision on June 1, 1982 (App. 253-275). The district court granted a partial stay on September 21, 1982 (App. 276-299).

The seventh circuit stayed the entirety of the district court's decision on October 28, 1982 (App. 300-301), and then issued its judgment on the merits on May 20, 1983 (App. 304-305). It issued another full stay on July 21, 1983 (App. 302-303). Rehearing was denied on September 9, 1983 (App. 306-307).

JURISDICTION

The judgment sought to be reviewed was entered May 20, 1983 (App. 304-305). The State's petition for rehearing was denied September 9, 1983 (App. 306-307). Jurisdiction is conferred on this court by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

FEDERAL STATUTE INVOLVED

Interlocutory decisions.

> (a) [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts ...

granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions ...

28 U.S.C. § 1292.

STATE STATUTES INVOLVED

Aid to families with dependent children.

. . .

(3) . . .

(b) If the county agency finds a person eligible for aid under this section, such agency shall on a form to be prescribed by the department, direct the payment of such aid by order upon the county clerk or county treasurer of the county. Payment of aid shall be made monthly, except that the director of the county agency may, in his discretion for the purpose of protecting the public, direct that the monthly allowance be paid in 2 or more instalments.

Section 49.19, Wis. Stats. (1979-80).

Medical assistance; recipients of social security aids. (1) ELIGIBILITY. (a) The following shall receive medical assistance under this section:

1. Any person included in the grant of aid to families with dependent children.

Section 49.46, Wis. Stats. (1979-80).

STATE ADMINISTRATIVE CODE PROVISION INVOLVED

Payment of aids. All payments to recipients of aid to families with dependent children (including payments on behalf of children in foster homes or a child-caring institution pursuant to s. 49.19(10), Stats.), shall be made under the following provisions:

. . . .

(3) DATE. Payment of assistance shall be made in the month for which the grant of aid is designated, either in the full amount of the monthly allowance or in 2 or more installments. When a single payment is made for the full amount of the monthly allowance, it shall be made not later than the fifth day of the month. When the monthly allowance is made in installments, each installment shall be for equal periods based on a 30-day month. Payment of the first installment shall be made no later than the fifth day of the month and each subsequent installment no later than the

fifth day of each installment period. Payment of an initial allowance may be made subsequent to the fifth day of the month and shall be made within the month. Additional payments made to meet increased budgetary needs may be made subsequent to the fifth day of the month and payments correcting any prior underpayment may be made any time prior to the end of the twelfth month following the month in which such underpayment occurred.

(4) COVERAGE. Initial payment may include the needs to the first of the month in which aid is applied for and eligibility is shown to have existed as of the first of such month; provided, however, that this provision shall not preclude continuing payments when an eligible recipient moves from one county to another nor adjustments when grants of aid are reinstituted after suspension, nor adjustments upon order of the state department of health and social services, division of family services, made in accordance with s. 49.50(8), Stats., nor in any case or similar cases in which a court decision changes the regulation upon which the case was denied, discontinued or the budget of the recipient was improperly computed, resulting in an

> improper reduction in the amount of aid.

Section PW-PA 20.11 Wis. Adm. Code (1980).

STATEMENT OF THE CASE

The case involves the adequacy of AFDC and MA benefit reduction notices and accompanying explanatory material promulgated by the State in an effort to comply with the Omnibus Budget Reconciliation Act (OBRA) of 1981. The explanatory material appears at 533 F. Supp. 841-44 (App. 229-252).

This petition is concerned only with situations where MA eligibility is dependent on AFDC eligibility. Buckhanon, 708 F.2d at 1217 n. 7, or where only AFDC eligibility exists. It is undisputed that all AFDC checks for the month of January had been mailed prior to January 14, 1982. There was no

showing that any class member was receiving installment payments.

The complaint alleged violation of federal constitutional, statutory and regulatory provisions. The district court had federal question jurisdiction under 28 U.S.C. § 1331. See Buckhanon, 533 F. Supp. at 825.

On January 14, 1982, the district court granted preliminary injunctive relief requiring the State to "'reinstate [benefits] to their original level.'" Buckhanon, 533 F. Supp. at 840. On June 1, 1982, in response to an oral motion to clarify, the district court issued orders requiring the State to "pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits" and to "pay for the medical services received by eligible plaintiffs after January 14, 1982" (App. 275).

Both orders were appealed by the State and respondents cross-appealed from the denial of medical services prior to January 14. On May 20, 1983, the seventh circuit modified the district court's decision, holding that the Eleventh Amendment precluded an award of AFDC benefits for the full month of January and requiring the State to make pro-rata AFDC and MA payments commencing January 14, 1982. Buckhanon, 708 F.2d at 1215-16 (App. 138-139). On appeal, the Seventh Circuit refused to examine any issue other than the effect of the Eleventh Amendment on the district court's award of injunctive relief.

ARGUMENT

I. Where There Has Been Compliance With State Law Requiring Monthly Benefit Grants To Be Determined And Paid By A Specified Date, Any Injunction Entered After That Date Which Purports To Require The Payment Of Benefits For A Portion Of That Month Violates The Eleventh Amendment.

A. The eleventh amendment prohibits any award of benefits when the State's liability for payment has already accrued or where no determination that the benefits sought were wrongfully withheld has been made.

In Edelman v. Jordan, 415 U.S. 651, 664 (1974), this Court held that the Eleventh Amendment precludes "the award of an accrued monetary liability which must be met from the general revenues of the State, absent consent or waiver by the State of its ... immunity ...." This Court also held that, "we will find waiver only where stated 'by the most

express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Edelman, 415 U.S. at 673. Later decisions made it clear that Edelman does not bar prospective relief, even in certain circumstances where that relief is financial in nature. The key inquiry is whether "the injunction ... looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past." Milliken v. Bradley, 433 U.S. 267, 290 n. 21 (1977). Thus, Milliken reaffirmed the proposition that an award of monetary relief is not permissible when:

> It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower

> time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.

Edelman, 415 U.S. at 668.

The dividing line for purposes of an Eleventh Amendment analysis is the date that the district court first grants injunctive relief. Fitzpatrick v. Bitzer, 427 U.S. 445, 451 (1976). At that time, there must be a determination that the particular benefits sought were wrongfully withheld: "In Edelman this court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness violated the Eleventh Amendment." Id.

Even when wrongfulness has been determined, prospective relief cannot be obtained where such relief constitutes a

monetary award for prior unlawful conduct. See Miener v. State of Mo., 673 F.2d 969 (8th Cir. 1982); Jackson Sawmill Co. v. United States, 580 F.2d 302, 309-10 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979); State of Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449, 457 (6th Cir. 1982).

The seventh circuit alluded to these general principles but did not correctly apply them to the facts of this case.

B. The State's liability for all January benefits had already accrued by the time injunctive relief was initially granted; no determination that January benefits were wrongfully withheld was made until the June 1 order was entered.

The State has no quarrel with the seventh circuit's basic premise that the date of entry of an injunction generally constitutes the dividing line from which

a determination must be made as to whether relief is prospective or retroactive. Buckhanon, 708 F.2d at 1215. But, once that dividing line is determined, the initial inquiry which must be made is whether monetary liability for the particular payment sought has already accrued.

In this case, the seventh circuit relied upon three cases--Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied, 444 U.S. 950 (1980); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975) and Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981)--for the proposition that benefits may be awarded for each day subsequent to the issuance of an injunction.

Despite a vigorous dissent, the majority in Kimble did hold that it was

powerless to make an award of MA benefits for services received prior to the date of the preliminary injunction, and was free to make such an award for services received thereafter. But there is no indication in that case that MA eligibility was determined monthly. Unlike the situation in Kimble, the class members here had to be "person[s] included in the grant of aid to families with dependent children" in order to receive MA for the month of January. Sec. 49.46(1)(a)1., Stats. (1979-80). The district court, however, acted too late to restore any AFDC grants for that month. Those class members who were improperly "included in the [January] grant for aid to families with dependent children" within the meaning of sec. 49.46(1)(a)1., Stats., were thus also

improperly awarded MA benefits for that month.

The reference to Vargas typifies the inconsistent application of the Eleventh Amendment by the seventh circuit to a given set of facts. In Vargas, 508 F.2d at 491, the court said: "We conclude that the entry of a court order or judgment requiring that payments be made divides the past from the prospective for Eleventh Amendment purposes. Accordingly, an order requiring payment of the October deficiencies in issue here would be retroactive in its application." It is possible to speculate, as this panel did, that those statements were not accurate because the Eleventh Amendment was never actually applied; it is more logical to conclude that the Vargas language embodies a correct analysis of the court's inability

to grant relief because Illinois' monetary liability for the entire month of October had already accrued.

Reliance on King was plainly in error. The King court did not award benefits commencing with the date of entry of its injunction. It required payment commencing with the next series of checks due under state law, presumably because Massachusetts' monetary liability for the first series of semi-monthly checks had already accrued.

The concept of accrual is most commonly employed in the area of taxation, where it has been explained in the following fashion:

> Under the accrual method, income is accounted for when the right to receive it comes into being, that is, when all the events which determine the right have occurred. It is not the actual receipt but the right to receive which governs. Expenses are deductible on the accrual basis in

> the year when all the events have occurred which fix the amount of the item and determine the liability of the taxpayer to pay it.

Standard Federal Tax Reports: 1984 U.S. Master Tax Guide (CCH), ¶ 611 at 215. (Emphasis added.) In the Eleventh Amendment context, the concept of accrual means that a state should not be required to pay "bills which are currently due and owing" because "the state will not have an opportunity to change its course of conduct to minimize the cost should it decide not to assume this added cost." Meeker v. Manning, 540 F. Supp. 131, 141, 142 (D. Conn. 1982).

The seventh circuit failed to apprehend the meaning and importance of section PW-PA 20.11(3) Wis. Adm. Code (1980) with respect to the question of whether liability had accrued. In Wisconsin, administrative code provisions

do not merely limit or pertain to the way in which agency business is conducted, and any and all such provisions have the force of law. Johnson v. Misericordia Community Hosp., 97 Wis. 2d 521, 294 N.W.2d 501, 509 (Wis. App. 1980), aff'd, 99 Wis. 2d 708, 301 N.W.2d 156 (1981). Such administrative code provisions therefore determine when the State's monetary liability accrues by defining when the State's legal obligation to make benefit payments arises.

Although the seventh circuit alluded to "numerous circumstances" where benefit payments could lawfully be made after monetary liability had accrued, it found no waiver on the part of the State. Compare Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147, rehearing denied, 451 U.S. 933 (1981). Consequently, it is immaterial that the

State could lawfully have waived its Eleventh Amendment immunity by making payment at a point in time after injunctive relief was initially granted.

Moreover, the circumstances cited are all irrelevant to this case. The first sentence of section PW-PA 20.11(3) Wis. Adm. Code (1980) relied upon by the seventh circuit refers to "[p]ayment of an initial allowance." The vast majority of class members were already on AFDC and therefore ineligible to receive such an allowance. Eligibility determinations for those few class members who might have been eligible for such an allowance had already been completed prior to January 5, 1982. The court also referred to the first portion of the second sentence of section PW-PA 20.11(3) Wis. Adm. Code (1980), which allows "[a]dditional payments made to meet increased

budgetary needs." This phrase refers to changes in the circumstances of the recipient which justify an increase in the grant. For example, increased work-related expenses or an increase in the number of dependents might justify an additional benefit award. No such circumstances are present here. Reliance was also placed upon the third phrase of section PW-PA 20.11(3) Wis. Adm. Code (1980), which indicates that "payments correcting any prior underpayment may be made any time prior to the end of the twelfth month following the month in which such underpayment occurred." This language was derived from 45 C.F.R. § 233.20(a)(12)(ii)(a) (1980). See Burton v. Department of Health & Social Serv., 103 Wis. 2d 670, 309 N.W.2d 388, 391 (Wis. App. 1981). It was therefore aimed at "correction of underpayments to

current recipients, resulting from administrative error." 45 C.F.R. § 233.20(a)(12)(ii) (1980). Any clericl errors made in this case are irrelevant to an Eleventh Amendment analysis. Finally, section PW-PA 20.11(4) Wis. Adm. Code (1980), refers to situations in which "a court decision changes the regulation ...." That simply is not the case here. None of the administrative code provisions alluded to by the seventh circuit are sufficient to transform a retroactive award into one which is purely prospective.

Even if the preceding analysis could somehow be overcome, the established test was not properly applied. A January 14 order to "reinstate [benefits] to their original level"--after January eligibility had been determined, after the final

date for mailing January checks had passed and after January checks had actually been issued--is not a determination that the withholding of benefits for that month was legally impermissible. It was not until the June 1 orders were issued that the State's obligation to pay January benefits was decided (App. 253-275). No determination of wrongfulness occurred until that decision was made. By that time, the Eleventh Amendment effectively insulated the State from a benefit award of any kind.

II. The Unappealed Order Initially Granting Preliminary Injunctive Relief Was Improperly Employed To Bar Consideration Of The State's Appellate Claim That No Benefits Should Have Been Awarded For The Period Subsequent To The Date Of Entry Of That Injunction.

A. An order modifying an earlier preliminary injunction is appealable as of right.

28 U.S.C. § 1292(a)(1) (1976) permits appeals from "interlocutory orders continuing or modifying injunctions." The purpose of the statute is "to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955).

The proper test for appealability is as follows:

> For an interlocutory order to be appealable under 28

> U.S.C. § 1292(a)(1) (1976) as an order modifying an injunction, two requirements appear to be necessary and must be satisfied: (i) the original or prior order must have been injunctive in character, and (ii) that injunction must have been modified in some respect by the order from which the appeal has been taken.

Hoots v. Com. of Pa., 587 F.2d 1340, 1348 (3rd Cir. 1978). This test applies regardless of whether a motion for modification or a motion for clarification has been filed: "We see no sound reason to suppose that the Congressional judgment as to the importance of immediate review of interlocutory orders refusing to alter or dissolve injunctions does not extend with equal force to a non-hypothetical dispute as to an injunction's breadth, inasmuch as clarification and modification may be virtually indistinguishable." New York Telephone Co. v.

Communications Wkrs. of Amer., 445 F.2d 39, 40 (2d Cir. 1971).

B. Since the orders appealed from modified a preliminary injunction, they were appealable in their entirety as of right.

The seventh circuit premised its decision on the belief that any aspect of the State's appeal which implicated the validity or correctness of the January orders was jurisdictionally barred. Buckhanon, 708 F.2d at 1214. Such a position is untenable. Carried to its logical conclusion, it would mean that an order refusing to dissolve a preliminary injunction could never be successfully appealed because the appellate court would be powerless to overturn the initial issuance of that injunction.

When jurisdiction is at issue, the proper inquiry is whether the order appealed from alters a previously-issued

injunction. If it does, the order is appealable in its entirety. An order which constitutes a broad modification of a preliminary injunction gives rise to a correspondingly broad appeal.

In this case the orders appealed from determined for the first time that the State was required to "pay AFDC benefits for the month of January ... at December ... levels" and to "pay for medical services received after January 14, 1982" (App. 275). Even though certain of its arguments might have called into question statements previously made by the district court in the memorandum decision accompanying the earlier order, the State had a statutory right to argue that it could not lawfully be required to do either of these things.

C. Even if the State had no absolute right to challenge any items addressed by the district court in its initial memorandum decision, the seventh circuit had discretion to entertain such a challenge.

The seventh circuit has indicated to prospective appellants that it will not accept the anamoly of

> an undeviating or uncompromising rejection of any consideration of the propriety of the granting of a preliminary injunction ... [because it] puts the reviewing court in the position of saying that even though there may have been an error ... in granting the injunction, the court cannot look at such matter now but must leave the injunction intact unless changes in the situation requiring modification have occurred subsequent to the granting [of the injunction].

Fern v. Thorp Public School, 532 F.2d 1120, 1129 (7th Cir. 1976). It then proceeded to overturn an unappealed preliminary injunction. See also United

States v. City of Chicago, 534 F.2d 708, 711 (7th Cir. 1976). A similar approach is taken by the third circuit, and cases from each circuit are cited by the other:

> The scope of an appeal from an interlocutory order is not limited to the appealable order alone. An appellate court has the power to review certain otherwise unappealable orders once it has jurisdiction over the case.

Merrell-Nat. Labor., Inc. v. Zenith Labor., Inc., 579 F.2d 786, 791 (3rd Cir. 1978). See also Empire Nat. Bank of Clarksburg v. Penfield Coal & Coke Co., 354 F.2d 873 (3rd Cir. 1966). The third circuit has also said:

> When the issues are ... inextricably intertwined, we are presented with the "special circumstances" previously noted by this Court in which the scope of appellate review of the denial of a motion to dissolve a preliminary injunction

> "reach[es] the underlying injunction."

Cerro Metal Products v. Marshall, 620 F. 2d 964, 973 (3rd Cir. 1980).

The State's liability for benefits subsequent to January 14 cannot be resolved without examining the contents of both decisions made by the district court. The seventh circuit improperly applied a jurisdictional test, rather than exercising the full range of its discretion.

D. The seventh circuit abused its discretion in refusing to permit the State to challenge any aspect of those items addressed by the district court in its initial memorandum decision.

The three reasons given by the seventh circuit for finding an absence of special circumstances which would permit a challenge to items addressed in the earlier memorandum decision were that the

Eleventh Amendment issue could be separated from the notice question, that the State's failure to appeal the preliminary injunction was inexcusable because the district judge had given no indication that the notice question was open to reconsideration and that the State could not establish error with respect to the notice question because law concerning the adequacy of benefit notices is well-settled and was correctly applied.

There is, in fact, a substantial body of law rejecting those decisions cited by the seventh circuit for the proposition that the State's notices were inadequate. See Garrett v. Puett, 557 F. Supp. 9, 13-14 (M.D. Tenn. 1982), aff'd per curiam, 707 F.2d 930 (6th Cir. 1983); Punohu v. Sunn, 666 P.2d 1135 (Hawaii 1983). Cf. LeBeau v. Spirito, 703 F.2d

639, 644 n. 2 (1st Cir. 1983). Relying upon this line of authority, the State specifically requested the seventh circuit to reconsider its earlier decision. Yet, no mention of this request is contained in its decision.

And, it is precisely because the notice question and the Eleventh Amendment question are conceptually severable that the failure to appeal was excusable in this case. The State could hardly be expected to appeal a preliminary injunction which it believed would cost it nothing because of the existence of its Eleventh Amendment immunity. But when the question of whether the initial injunction applied to the award of January benefits was finally resolved, the State suddenly found itself in the position of having to pay millions

of dollars in such benefits (App. 290-291).

The special circumstance presented here is the district court's failure to resolve until June the interrelated questions of whether the initial injunction contemplated an award of January benefits and whether the State would be shielded from any such award by virtue of the existence of its Eleventh Amendment immunity. Because the timing of the district court's orders impinged upon the State's ability to challenge the contents of an adverse order whose financial parameters were not defined until the State's time to appeal had elapsed, issues concerning the earlier memorandum decision should have been examined, rather than ignored.

CONCLUSION

In questions concerning the exercise of federal judicial power over a sovereign state, the danger of arbitrariness is always present because the federal courts themselves determine whether and in what manner such power will be exercised. If a pattern of arbitrariness emerges, a state and its taxpayers may be unfairly and unjustly penalized. The seventh circuit has exhibited no consistency whatsoever in the manner in which it exercises such power. This Court is the final arbiter of such crucial questions of federalism.

A writ of certiorari should issue to the Seventh Circuit Court of Appeals so that this Court may review and ultimately reverse the seventh circuit's decision that the Eleventh Amendment does not bar an award of benefits subsequent to

January 14, 1982, and that the State was precluded from challenging the district court's award of benefits after that date.

Dated at Madison, Wisconsin this 7th day of December, 1983.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
of Wisconsin

Attorneys for Petitioners

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Office - Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS,
CLERK

83-951

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (VOLUME I)

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
of Wisconsin

Attorneys for Petitioners

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

INDEX TO SEPARATE APPENDIX

PAGE

VOLUME I

1. APPENDIX A: 101-138
Memorandum decision and orders of the United States Court of Appeals for the Seventh Circuit dated May 20, 1983: Buckhanon v. Percy, 708 F.2d 1209 (7th Cir. 1983).

VOLUME II

2. APPENDIX B: 139-252
Memorandum decision and orders of the United States District Court for the Eastern District of Wisconsin dated January 14, 1982: Buckhanon v. Percy, 533 F. Supp. 822 (E.D. Wis. 1982).

VOLUME III

2. APPENDIX B: 229-252
Exhibit A to Memorandum decision and orders of the United States District Court for the Eastern District of Wisconsin dated January 14, 1982: Buckhanon v. Percy, 533 F. Supp. 822 (E.D. Wis. 1982).

PAGE

3. APPENDIX C: 253-275
Unpublished memorandum decision and orders of the district court dated June 1, 1982.

4. APPENDIX D: 276-299
Unpublished memorandum decision and order of the district court granting a partial stay, dated September 21, 1982.

5. APPENDIX E: 300-302
Stay issued by the seventh circuit, dated October 28, 1982.

6. APPENDIX F: 303-304
Order and stay issued by the seventh circuit, dated July 21, 1983.

7. APPENDIX G: 305-306
Judgment of the seventh circuit, dated May 20, 1983.

8. APPENDIX H: 307-308
Order of the seventh circuit denying rehearing, dated September 9, 1983.

APPENDIX A
[708 F.2d 1209]

Geraldine BUCKHANON and Rosetta Bailey, et al., Plaintiffs-Appellees and Cross-Appellants,

v.

Donald PERCY, Bernard J. Stumbras and Kenneth Rentmeester, et al., Defendants-Appellants and Cross-Appellees.

Nos. 82-2057, 82-2142.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 9, 1983.

Decided May 20, 1983.

As Amended May 31 and June 15, 1983.

Recipients of aid to families with dependent children benefits, food stamp and/or medical assistance benefits brought class action for declaratory and injunctive relief challenging on the basis of improper notice reduction or termination of benefits under the Omnibus Budget Reconciliation Act of 1981. On plaintiffs' motion for preliminary injunction, the United States District

Court for the Eastern District of Wisconsin, 533 F.Supp. 822, Robert W. Warren, J., entered judgment, and appeal was taken. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) the Court of Appeals had jurisdiction over appeal, and (2) Eleventh Amendment prohibited retroactive payment of AFDC payments.

Ordered accordingly.

1. Federal Courts Key No. 657

However a particular motion or order is styled, provision stating that the Court of Appeals shall have jurisdiction of appeal from interlocutory orders of district courts granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions is not intended to allow litigants to circumvent by filing of repetitive motions the time limitation

for taking appeals. 28 U.S.C.A. § 1292(a)(1).

2. Federal Courts Key No. 558

Although trial court considered question of liability of state due to alleged inadequate notices of reduction or termination of aid to families with dependent children benefits, food stamps and/or medical assistance benefits, trial court never considered whether district court had authority in an opinion issued on January 14, 1982 to order as a remedy payment of January benefits and as this represented an important and substantially different question from that decided in the January 14, 1982 order, a later order entered June 1, 1982 concluding that order reinstating AFDC benefits for the month of January at December levels did not violate Eleventh Amendment but that medical assistance benefits

could be paid only for services received after the date of the court order, was appealable. 28 U.S.C.A. § 1292(a)(1); Social Security Act, §§ 401 et seq., 1901 et. seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; U.S.C.A. Const. Amend. 11.

3. **Federal Courts Key No. 653**

Where January order requiring the state to bring notices of reduction or termination of aid to families with dependent children benefits, food stamps and/or medical assistance benefits given by the Wisconsin Department of Health and Social Services into conformity with governing legal standards was not appealed during 30-day period required by appellate procedural rule and compliance with that rule is jurisdictional, the Department could not appeal preliminary injunction granted in January preventing reduction or termination of benefits

under the Omnibus Budget Reconciliation Act of 1981. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; U.S.C.A. Const. Amend. 11; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; F.R.A.P.Rule 4(a), 28 U.S.C.A.

4. **Federal Courts Key No. 265**

Eleventh Amendment prohibited retroactive payment of aid to families with dependent children benefits. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; U.S.C.A. Const. Amend. 11.

F. Thomas Creeron, III, Wis. Dept. of Justice, Madison, Wis., for defendants-appellants/cross-appellees.

Mary Fisher, Bernet, Legal Action of Wis. Inc., Milwaukee, Wis., for plaintiffs-appellees/cross-appellants.

Before CUDAHY and POSNER, Circuit Judges, and HOLDER, District Judge.*

CUDAHY, Circuit Judge.

The plaintiffs-appellees in this case represent a class of recipients of benefits administered by the state of Wisconsin under the federal Aid to Families with Dependent Children ("AFDC") and Medical Assistance ("MA") programs, whose benefits were reduced or terminated as a result of certain changes mandated by the Omnibus Budget Reconciliation Act of 1981 ("OBRA"). They sued the defendants-appellants, who are officials of the Wisconsin Department of Health and Social Services ("Department"), charging that the notices of reduction or termination which they had received were legally inadequate and seeking to enjoin the

---

* The Honorable Cale J. Holder, District Judge for the Southern District of Indiana, is sitting by designation.

Department from putting the changes into effect until adequate notice had been given. After the district court had granted a preliminary injunction on January 14, 1982, the Department moved for a clarification of the order on grounds that payment of January benefits was barred by the Eleventh Amendment. In a June 1, 1982, order, the district court held that payment of January AFDC benefits was not barred by the Eleventh Amendment, but that MA benefits could only be received for services incurred after the court's January 14, 1982, order. The defendants have appealed the June decision to us, as well as the preliminary injunction issued in January. The plaintiffs have cross-appealed the court's decision that medical benefits should be paid only from January 14, 1982. We dismiss the appeal of the January order granting an injunction for

want of jurisdiction and affirm in part and modify in part the district court's judgment in light of the Eleventh Amendment.

I

The State of Wisconsin participates in the Aid to Families with Dependent Children and Medical Assistance programs described in Titles IV and XIX of the Social Security Act, 42 U.S.C. §§ 601 et seq. and §§ 1396 et seq. (1976). Under these statutory schemes, the federal government partially reimburses participating states for financial and medical assistance benefits provided to eligible families and for the costs of administering the program. As a condition of receiving federal funds, states must operate programs which conform with the requirements set forth in the Social Security Act and implementing regulations.

On August 13, 1981, Congress enacted the Omnibus Budget Reconciliation Act, Pub.L. No. 97-35, which mandated a series of changes affecting the calculation of resources, eligibility and benefits for the various aid programs. In order to implement the mandated changes in the income and asset requirements, the Wisconsin legislature passed a series of changes in Wisconsin law, effective December 5, 1981. To put the new law into effect, the Department then reprogrammed, or "converted," the computer system by which individual grants were calculated. The conversion processing resulted in the reduction or termination of aid for many individuals. Since MA eligibility may be derived from AFDC eligibility, pursuant to Wis.Stat. section 49.46(1)(a) (1979-80),[1] the process also

---

1. MA eligibility may also be based upon meeting certain financial and (footnote continued)

resulted in the termination of medical benefits for those individuals who were no longer entitled to AFDC after the changes.

Every AFDC or MA recipient whose benefits were reduced or terminated as a result of the OBRA changes received a notice informing him or her of that fact. These notices, generated by computer, contained a one-sentence explanation of the reason for the termination or reduction; they were accompanied by a preprinted foldout entitled "Explanation of Program Changes." The foldout described the various OBRA and state law changes affecting eligibility and benefits. Only if the recipient read the individual notice in conjunction with the relevant section of the foldout was it possible to

---

personal characteristic requirements under Wis.Stat. § 49.47(4)(1979-80).

conclude why his or her benefits had been changed.[2]

On December 21, 1981, the plaintiffs filed a complaint seeking declaratory and injunctive relief, on the grounds that these notices were inadequate; at the same time they filed a motion to certify a class under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The suit sought to enjoin the state from reducing or terminating any benefits without providing recipients with an adequate written notice containing the specific reasons and computations which resulted in the change. A hearing on the motion for a preliminary injunction was held on December 30, 1981 and January 8, 1982. In an order issued January 14,

---

2. A copy of the foldout and detailed descriptions of the notices sent in relation to the various program cuts are set out in Buckhanon v. Percy, 533 F.Supp. 822 (E.D.Wis.1982).

1982, Buckhanon v. Percy, 533 F.Supp. 822 (E.D.Wis.1982), the district court certified as a class all persons in Wisconsin whose benefits had been reduced or terminated as a result of the implementation of the OBRA changes reflected in the foldout and accompanying notices generated by the December 12, 1981 conversion. As to the members of that class, the court granted the motion for a preliminary injunction, ordering the defendants to "reinstate to their original level" the benefits of those members of the plaintiff class whose aid was reduced or terminated as a result of seven specific OBRA provisions, in relation to which the judge found the notices to be inadequate. 533 F.Supp. at 840. He also ordered the Department to submit proposed revised notices to the court by January 22, 1982. Id. at 841.

Rather than appealing this decision, the defendants filed revised notices on January 18, 1982, which contained case-specific information and computations; and these notices were mailed to most aid recipients before the date when February benefits were to be paid.[3] After a hearing held on January 20, 1982, the court approved the revised notices. During that hearing the defendants raised for the first time, in the form of an oral motion to clarify the preliminary injunction, the question whether payment of January benefits was barred by the Eleventh Amendment. In an order of June 1, 1982, the district court addressed this issue and concluded that

---

3. A number of recipients did not receive the new notice before February and a motion to modify the preliminary injunction was later filed by the Department with respect to whether this timing entitled them to February benefits, but that motion is not before us here.

its order reinstating AFDC benefits for the month of January at December levels did not violate the Eleventh Amendment but that MA benefits could only be paid for services received after the date of the court order, January 14, 1982. On July 1, 1982 the defendants filed a notice of appeal from the orders entered on June 1, 1982 in response to the motion to clarify, specifying that they were appealing (1) the order to pay AFDC benefits for the month of January 1982 at December 1981 levels and (2) the order to pay for medical services received after January 14, 1982. The plaintiffs cross-appealed that portion of the court's June 1 order which denied MA coverage from January 1, 1982 through January 14, 1982. They also cross-appealed the dismissal of two organizational plaintiffs for lack of standing, but that appeal has been voluntarily withdrawn. On

October 28, 1982, this court granted a stay pending appeal of the district court's injunction.

II

[1] The initial question for our consideration is one of jurisdiction, that is, whether the June 1, 1982, order is appealable to us. Our jurisdiction, if it exists, must rest on 28 U.S.C. Section 1292(a)(1): "The courts of appeals shall have jurisdiction of appeals from ... [i]nterlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions...." 28 U.S.C. § 1292(a)(1) (1976). The June order under consideration here was issued in response to a motion to clarify the January injunction. The statute, on the other hand, allows interlocutory appeals as an exception to the finality rule in cases

where an order modifies an injunction. But, however a particular motion or order is styled, this provision on appealability is not intended to allow litigants to circumvent by the filing of repetitive motions the time limitation for taking appeals. See Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 750 (7th Cir.1976); Merrell-National Laboratories v. Zenith Laboratories, Inc., 579 F.2d 786, 790-91 (3dCir.1978); see also 9 J. Moore, Moore's Federal Practice ¶110.20[2] (2d ed. 1982).

In deciding whether the order before us is appealable under Section 1292(a)(1), our cases direct us to consider the substance rather than the form of the motion: "If we were satisfied that modification, or refusal of requested modification, rather than construction were the real substance of the

matter, we could recognize such substance, disregard form, and exercise jurisdiction." S.E.C. v. Investment Corp. of America, 369 F.2d 383, 384 (7th Cir.1966). Thus, even if the motion in the case at hand were captioned a motion to "modify" but was in fact an attempt to relitigate the original injunction, we would not have jurisdiction over it. If, on the other hand, the motion here was what one court has called "functionally the equivalent" of a motion to modify, we may assert jurisdiction. Merrell-National Labs, 579 F.2d at 791.

The precise question before us, therefore, is whether the substance of the June 1, 1982, order was modification (or denial of modification) of the order of January 14, 1982. The plaintiffs argue that it was clear from the January order that the department would have to pay January benefits, and that the June

order merely clarified this fact. In support of their position, they point to the language the district judge used in January:

> the Court ... orders defendants to reinstate to their original level the AFDC, MA, and FS [Food Stamp] benefits ....
>
> The Court recognizes that the State of Wisconsin will incur substantial costs in continuing benefits at pre-OBRA levels while complying with due process. It also recognizes that the State will incur costs in preparing new notices and programs which comply with due process. These costs can be minimized, however, by rapidly developing notices which comply with due process.

533 F.Supp. at 840, 839. Plaintiffs also point to various statements in affidavits filed by Bernard J. Stumbras, one of the defendant officials, which indicate that the Department contemplated that January checks would have to be issued if the court entered an injunction on the question of notice. The Department, on the

other hand, asserts that these statements were made before the date when checks are ordinarily issued in Wisconsin, January 5, and were predicated upon the assumption that an opinion would be rendered by the court before that date, thus making the payment of January benefits prospective, rather than retrospective.

[2] This is a very close case. Judge Warren does seem originally to have contemplated payment of January benefits, yet he treated the Eleventh Amendment, question, when raised at the January 20, 1982 hearing, as a novel one. Our previous cases suggest that in deciding whether a motion is in substance one to clarify or to modify an injunction we should consider whether it raises new substantive issues or material which has not been argued or presented rather than merely repetitive arguments stemming from a motive to relitigate issues which

have been decided. United States v. City of Chicago, 534 F.2d 708, 711 (7th Cir. 1976); Squillacote, 534 F.2d at 750; see also Merrell-National Labs, 579 F.2d at 791. In the case at hand, the question of Eleventh Amendment immunity was an important issue which had not been litigated in January; and it is one which is analytically separate from the one before the court at that time--the adequacy of the notices given aid recipients. Even were the notices inadequate and the state thus "liable," recovery of retroactive payments might still be prohibited by Supreme Court decisions interpreting the Eleventh Amendment. See Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Put another way, although it considered the question of liability, the court never considered whether a district court had the authority, in an opinion issued on January 14,

to order as a remedy payment of January benefits. Because this presents an important and substantially different question from that decided in the order of January 14, 1982, we therefore hold that the order of June 1, 1982, is appealable under 28 U.S.C. Section 1292(a)(1) and that we therefore have jurisdiction with respect to it.

Having decided that we have jurisdiction to review the June order, we must still decide what is the scope of that review. Defendants argue that our jurisdiction is not limited to the Eleventh Amendment question but rather extends, once jurisdiction is asserted, to all the provisions of the injunction issued in January as well. They insist that it was only when the June 1, 1982, order was issued that the Department became cognizant of the full financial magnitude of the preliminary injunction, and they draw

our attention to the case of Fern v. Thorp Public School, 532 F.2d 1120 (7th Cir.1976), as support for the proposition that an appeal from an order modifying or clarifying a preliminary injunction calls into question the initial reasons for issuance of that injunction, since those reasons are a necessary predicate to the order appealed from.

We note that in the Fern case this court, while asserting jurisdiction over the denial of a motion to vacate a preliminary injunction which had not itself been appealed, specifically eschewed the conclusion that "any rule of general application" was to be derived from its action. 532 F.2d at 1130. We have refused to apply Fern in subsequent cases and have espoused an intention to apply the rule foreclosing appeal on a pragmatic basis. Squillacote, 534 F.2d at 750. Moreover, commentators have

regarded Fern as a somewhat exceptional case. In discussing it, Wright and Miller noted:

> The [Fern] court appears to have been influenced by the view that the district court had tacitly suggested to the defendants that they seek reconsideration. If the parties have indeed been led to believe that the propriety of the injunction is open to full reconsideration in the trial court, the failure to appeal from the initial order is excusable, and the scope of the appeal may properly extend to the initial order. In addition, even though there has been no change in circumstances, it would seem appropriate to treat it as an abuse of discretion to refuse to vacate an order that was very clearly wrong when issued.

16 C. Wright, A. Miller, E. Cooper, and E. Gressman, Federal Practice and Procedure § 3924 (1977 & Supp.1982). Indeed, the Fern decision appears to have been linked to a situation in which two factors coincided: 1) the failure to appeal was excusable, and 2) the court

perceived a substantial abuse of discretion in the granting of the injunction in the first instance. Here, by contrast, Judge Warren gave no indication that his findings on the adequacy of the challenged notices were open to reconsideration.

Moreover, the law in this circuit on the contents of the notice required in such circumstances is both well settled and rather thoroughly elaborated. See Dilda v. Quern, 612 F.2d 1055 (7th Cir.), cert. denied, 447 U.S. 935, 100 S.Ct. 3039, 65 L.Ed.2d 1130 (1980); Banks v. Trainor, 525 F.2d 837 (7th Cir.1975), cert. denied, 424 U.S. 978, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976); Vargas v. Trainor, 508 F.2d 485 (7th Cir.1974), cert. denied, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975). Judge Warren painstakingly applied the relevant Seventh Circuit standard to each notice

about each program cut and made specific findings as to each. In "look[ing] through the door to see if we should open it," Fern, 532 F.2d at 1129 n. 6, we see no reason to reexamine Judge Warren's conclusions. The Department had thirty days in which to appeal in January of 1982. Fed.R.App. P. 4. Rather than take advantage of this opportunity, the Department brought the notices being used into conformity with Judge Warren's order in the space of one week. Its only reason for bringing up the notice question once again is a desire to escape the consequences of paying the January benefit by obtaining a belated holding on appeal that the original notices were adequate. In short, this is precisely the type of judgment protected by finality.

[3] Moreover, the notice issue presents a question separable from the

Eleventh Amendment issue raised by the June order and present before us here. There is no reason to think that Judge Warren would have evaluated the adequacy of the notices any differently had he known that the payment of January benefits might be prohibited by the Eleventh Amendment. Thus our analysis of this issue is entirely consistent with the rationale we have articulated for the exception to the finality rule in relation to the order of June 1, 1982. As we have said, that order raised a new and different issue from the one litigated in January and can be appealed on that basis. The January order to bring the notices given by the Department into conformity with the governing legal standard, however, was not appealed during the 30-day period required by Rule 4(a) of the Federal Rules of Appellate Procedure; since compliance with that rule is

jurisdictional, Browder v. Director of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978), the Department may not appeal the preliminary injunction granted in January to us at this time.[4]

III

Having concluded that our jurisdiction is limited to the Eleventh Amendment issue, we turn now to consider whether the district court exceeded its remedial

---

4. We also note that the Department did not specify, as it must pursuant to Fed.R.App. P. 3(c), the initial injunction about notice as a grounds for its appeal to us. In the Notice of Appeal filed on July 1, 1982, the Department stated that it was appealing the "orders entered in this action on June 1, 1982, issued in response to defendant's oral motion to clarify a preliminary injunction which orders: 1.) require defendants to pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits; and 2.) defendants to pay for medical services (medical assistance) received by eligible plaintiffs after January 14, 1982."

authority by ordering the Department in a January 14 order to pay January benefits.[5] The Department argues that payment of these benefits is barred by Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), in which the Supreme Court held that the Eleventh Amendment prohibited the award of retroactive relief against a state. The plaintiffs, on the other hand, argue that benefits paid monthly, for the expenses of that month, cannot be said to be retroactive if paid pursuant to an injunction issued by the court, as this one was, during the course of that same month. Following two district court cases which plaintiffs cite, in one of which October benefits were ordered

---

5. This issue might have been avoided had plaintiffs sought and Judge Warren granted a temporary restraining order pending his consideration of the issues presented by the complaint filed December 21, 1981.

reinstated in an order issued on October 29th, Porter v. Schweiker, 527 F.Supp. 150, 152 (D.Minn.1981), and in another of which July benefits were paid out pursuant to an order of July 25th, Turner v. Walsh, 435 F.Supp. 707, 715 n. 9 (W.D. Mo.1977), aff'd per curiam, 574 F.2d 456 (8thCir.1978), the district court here concluded that January benefits were merely a continuation of benefits rather than a retroactive grant.

We think the Eleventh Amendment issue here is somewhat more complex. What we are required to decide, in effect, is the dividing line between past and future for purposes of Eleventh Amendment immunity. To do so requires tracing the development of this law from Edelman v. Jordan. In Edelman, the Illinois state defendants were found to have violated federal regulations as to the timely processing of applications for

public aid, and the district court ordered that the benefits wrongfully withheld be paid. The Supreme Court, in reversing, held that such an award ran afoul of the Eleventh Amendment's prohibition of "payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation ... measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 668, 94 S.Ct. at 1358. Remedial orders which have fiscal consequences for the state treasury are permissible, however, so long as those costs are ancillary to compliance with prospective decrees. Id.; see also Milliken v. Bradley, 433 U.S. 267, 289, 97 S.Ct. 2749, 2761, 53 L.Ed.2d 745 (1977).

The permissibility of the remedial order in the case at hand thus turns upon whether it is "retroactive" or "prospective." In deciding where that dividing line falls, we have substantial guidance from the Edelman case itself and from subsequent Supreme Court interpretation of it. In Edelman, the Court spoke of "a time when petitioner was under no court-imposed obligation to conform to a different standard," 415 U.S. at 668, 94 S.Ct. at 1358; the Court later emphasized that the date for determining whether a monetary award is retroactive or prospective is that upon which the district court determined that the state's conduct was wrongful. Fitzpatrick v. Bitzer, 427 U.S. 445, 451, 96 S.Ct. 2666, 2669, 49 L.Ed.2d 614 (1976); see also 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4232 (1978 &

Supp.1982). That date in the case before us is January 14, 1982.

The only case in which this court has considered the retroactivity issue in the context of an award of public assistance benefits is Vargas v. Trainor, 508 F.2d 485 (7th Cir.1974), and the court's discussion of retroactivity there is dictum since the state was found to have waived the Eleventh Amendment arguments. Vargas was a class action which successfully challenged the reduction or termination by the Illinois Department of Public Aid of benefits to aged, blind and disabled recipients without adequate notice; the district court order of October 22 directed that October deficiencies be paid. A unanimous panel of this court found the award to violate the Eleventh Amendment, emphasizing that "the entry of a court order or judgment requiring that payments be made divides

the past from the prospective for Eleventh Amendment purposes." 508 F.2d at 491. In so concluding, the panel specifically rejected the argument that the event dividing the retroactive from the prospective was the beginning of the benefit payment period during which the injunctive order was entered.[6] Id. Although the court went on to imply that payment of any October deficiencies would be barred, the opinion does not examine that implication; and Judge Tone apparently never considered the possibility of pro rata payments for the portion of the month after entry of the court order, most likely because the case was decided on grounds of waiver and the entire month's benefits thus were paid.

---

6. This aspect of Vargas was not brought to our attention by either counsel in the instant case.

The obvious implication of Vargas for the case before us seems to be that payment of benefits of whatever kind for the period prior to January 14, 1982, is barred as retroactive, while payment for the period beginning January 14, 1982--the date upon which the State of Wisconsin came under a court-imposed obligation to provide more adequate notice before reducing or terminating benefits-is prospective. Both parties here, however, and the district court as well, seem to have regarded Wisconsin statutes and administrative regulations to be conclusive on this question, either allowing payment for the whole month or not at all. We are not convinced that the state's administrative procedure for delivering benefit checks is at all determinative of whether the relief in question is retroactive or prospective. Although Wisconsin usually issues checks

on the 5th of each month, there is no contention that the Department lacks authority to do so on the 14th. Clearly it may do so in numerous circumstances--an initial grant, a change of circumstances, or if payment is made in installments. See Wis. Stat. § 49.19(3)(b)(1979-1980) and Wis. Admin. Code § PW-PA 20.11(3)(1980). Although in some of these situations--an initial determination of eligibility, for example--the payment would be for the entire calendar month, Wis. Admin. Code § PW-PA 20.11(4), when such payment is made in compliance with a federal court order, the Eleventh Amendment prohibits the award of accrued benefits for the period prior to entry of the court's order.

Other circuits which have considered this question at some length, although in slightly different contexts, have reached conclusions similar to ours. The First

Circuit concluded that there was no Eleventh Amendment impediment to an order enjoining the State of Massachusetts to resume payment of AFDC payments pending an appeal and directed in an order of July 13, 1981 that the second semi-monthly checks for July be issued. Coalition for Basic Human Needs v. King, 654 F.2d 838, 842-43 (1st Cir.1981). Moreover, the Fourth Circuit, in a case holding that the state of Maryland, by failing to comply with adequate notice requirements, had wrongfully reduced Medicaid benefits, concluded that retrospective relief requiring the state to pay for past medical services would be barred but that the court could order prospective relief requiring the state to provide benefits under prereduction standards until such time as the state effected a legally effective reduction of benefits by mailing adequate notice.

Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1980). Thus, the court required the state to pay for medical services received by the plaintiffs after the date of the district court decree until at least ten days after adequate notice had been provided to aid recipients. Id. at 604-05.

[4] We conclude, therefore, that the district court's order in this case must be modified in part. The Eleventh Amendment prohibits payment of AFDC payments for the period from January 1, 1982 to January 14, 1982. Hence, that portion of the June 1, 1982, order directing payment for that period is reversed. That portion of the order which directs payment of benefits for the period from the entry of the court's January 14 order is affirmed. Since, as both parties argue to us, MA benefits are derivative from

eligibility for AFDC, pursuant to Wis. Stat. § 49.46(1)(a) (1979-1980), the order directing payment to the plaintiff class of MA benefits from January 14, 1981 is also affirmed.[7] Accordingly, this court's order of October 28, 1982, granting a stay pending appeal is hereby vacated, and the defendants are enjoined to pay AFDC and MA benefits to the plaintiff class for the period between January 14 and January 31, 1982.[8]

---

7. No facts or arguments have been presented to us about members of the plaintiff class whose medical benefits are not wholly derivative from eligibility for AFDC; hence we shall not speculate about benefits that might not be derivative.

8. We do not understand there to be any issue on appeal regarding payment of February benefits; that portion of the October 28, 1982, order granting a stay in relation to them is therefore vacated.

83-951

No. _____

Office - Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (VOLUME II)

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
of Wisconsin

Attorneys for Petitioners

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

APPENDIX B
[533 F. Supp. 822]

Geraldine BUCKHANON, et al., Plaintiffs,

v.

Donald PERCY, et al., Defendants.

No. 81-C-1601.

United States District Court,
E. D. Wisconsin.

Jan. 14, 1982.

Recipients of AFDC, food stamp and/or medical assistance benefits brought a class action for declaratory and injunctive relief challenging on the basis of improper notice the reduction or termination of benefits under the Omnibus Budget Reconciliation Act of 1981. On plaintiffs' motion for a preliminary injunction, the District Court, Warren, J., held that: (1) the class certified would be identified as all persons in Wisconsin whose benefits were reduced or terminated as a result of the implementations of provisions of the Act which were

reflected in the notices given to plaintiffs; (2) plaintiffs demonstrated a reasonable likelihood of success on their claim that the notices setting forth certain of the new provisions failed to comport with due process; (3) plaintiffs did not demonstrate a reasonable likelihood of success on their claim that the notice given with regard to certain other of the new provisions did not comport with due process; and (4) the evidence established that plaintiffs would be irreparably injured if an injunction was not issued, that the harm plaintiffs would suffer if an injunction was not issued outweighed the harm defendants would suffer by issuance of an injunction, and that the public interest would not be disserved by issuance of an injunction, and thus plaintiffs' motion

for a preliminary injunction would be granted.

Ordered accordingly.

1. **Federal Civil Procedure Key No. 189**

In class action challenging notices used to notify AFDC, food stamp and medical assistance recipients of denials, reductions or terminations of benefits due to Omnibus Budget Reconciliation Act, class certified would be identified as all persons in Wisconsin whose AFDC, food stamp, and/or medical assistance benefits have been or were being reduced or terminated as result of implementations of provisions of the Act which were reflected in notice "foldout" sent to recipients and accompanying notices. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus

Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A.Const.Amend. 14; Fed.Rules Civ.Proc. Rule 23(a), (a)(1, 2), (b)(2), 28 U.S.C.A.

2. Injunction Key No. 147

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs demonstrated a reasonable likelihood of success on their claim that notices setting forth new provisions which excluded from AFDC benefits persons whose gross earned income exceeded 150 percent of state's assistance standards for families the size of recipient's family failed to comport with due process. Social Security Act, §§ 401 et seq., 1901 et seq., 42

U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

3. Injunction Key No. 147

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs demonstrated reasonable likelihood of success on their claim that notice setting forth new provision which limited amount of earned income which could be disregarded as work-related expenses failed to comport with due process. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp

Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

4. Injunction Key No. 147

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs demonstrated reasonable likelihood of success on their claims that notices setting forth new AFDC/MA vehicle policy, under which equity value over $1500 in a first vehicle was included in a recipient's asset limit, as was all equity value in other vehicles, failed to comport with due process. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601

et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

5. Injunction Key No. 147

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs demonstrated reasonable likelihood of success on their claim that notices setting forth new provision which lowered asset limit for AFDC and MA recipients from $1500 to $1000 failed to comport with due process. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et

seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

6. Injunction Key No. 147

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs demonstrated reasonable likelihood of success on their claim that recipients whose aid was terminated or reduced as result of provisions which set maximum deduction from earned income for child care expenses were denied due process. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7

U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

7. Injunction Key No. 136(3)

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs were not entitled to preliminary injunctive relief with respect to changes which reduced earned income disregarded by applying it to net income rather than to gross income where defendants had not yet implemented such section or developed a notice pertaining to the section, in that no class members were affected by the provision. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396

et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq.; 95 Stat. 357; U.S.C.A. Const.Amend. 14.

8. Injunction Key No. 137(4)

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs failed to demonstrate reasonable likelihood of succeeding on their due process claim relating to provision dealing with eligibility of a pregnant woman with no other children, in that notice adequately informed aid recipients of defendants' proposed action and reason for the action. Social Security Act, §§ 401 et

seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 367; U.S.C.A. Const.Amend. 14.

9. Injunction Key No. 137(4)

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, plaintiffs failed to demonstrate a reasonable likelihood of succeeding on their due process claim relating to provision under which low income individuals between ages 18 and 21 were no longer eligible for MA simply on basis of their age, in that notice adequately informed aid recipients of

defendants' action and reasons for that action. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

10. Injunction Key No. 147

In class action brought by recipients of AFDC, food stamp and/or medical assistance benefits seeking on basis of improper notice a preliminary injunction preventing reduction or termination of benefits under Omnibus Budget Reconciliation Act of 1981, evidence established that plaintiffs would be irreparably injured if an injunction was not issued, that harm plaintiffs would suffer outweighed harm defendants would suffer and that public interest would not be

disserved by an issuance of injunction, and thus where plaintiffs had demonstrated likelihood of success on the merits, motion for preliminary injunction would be granted. Social Security Act, §§ 401 et seq., 1901 et seq., 42 U.S.C.A. §§ 601 et seq., 1396 et seq.; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.; Omnibus Budget Reconciliation Act of 1981, § 1 et seq., 95 Stat. 357; U.S.C.A. Const.Amend. 14.

Mary Fisher Bernet, Legal Action of Wisconsin, Inc., Milwaukee, Wis., for plaintiffs.

Waltraud A. Arts, Asst. Atty. Gen., Madison, Wis., for defendants.

MEMORANDUM AND ORDER

WARREN, District Judge.

On December 21, 1981, plaintiffs instituted this action for declaratory and injunctive relief on behalf of a

class of all persons in Wisconsin whose Aid to Families with Dependent Children (AFDC), Food Stamp (FS), and/or Medical Assistance (MA) benefits have been, are being, or will be denied, reduced or terminated without being provided an adequate written notice containing the specific reasons and computations requiring such action. Plaintiffs challenge the notices used to notify AFDC, Food Stamp and Medical Assistance recipients of denials, reductions or terminations of benefits claiming that the notices fail to provide them with adequate written notice in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Social Security Act, 42 U.S.C. §§ 601 et seq. and 1396 et seq., the Food Stamp Act, 7 U.S.C. §§ 2011 et seq., implementing federal regulations, and state law.

On December 30, 1981, counsel for the parties appeared in Court for a hearing on plaintiffs' motion for a preliminary injunction. At the conclusion of that hearing, the Court informed the parties that it would grant, in part, and deny, in part, plaintiffs' motion for class certification. In addition, it ordered the parties to submit to the Court additional memoranda addressing the adequacy of the notices sent on or about December 12, 1981 to those aid recipients whose aid was affected by the enactment of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub.L.No.97-35, 95 Stat. 357 and corresponding changes in Wisconsin law, Ch. 93, Laws of 1981.

Plaintiffs and defendants submitted their supplemental memoranda to the Court on January 6, 1982 and January 7, 1982, respectively. On January 8, 1982, counsel again appeared in Court to set

forth additional arguments. At the conclusion of that hearing, the Court took plaintiffs' motion for preliminary injunctive relief under advisement. Now, having considered the parties' briefs and arguments, the Court is prepared to rule on plaintiffs' motion. This memorandum and order constitutes the findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedures.

I. Stipulated Facts

Prior to appearing in Court, the parties agreed to the following facts:

1. The State of Wisconsin participates in the AFDC and Medical Assistance programs described in Titles IV and XIX of the Social Security Act, 42 U.S.C. § 601 et seq. and § 1396 et seq., respectively, through which the federal government partially reimburses participating states for the financial and Medical

Assistance benefits provided to eligible families and for the costs of administration of the programs. Wisconsin also participates in the Food Stamp program described in the Food Stamp Act, 7 U.S.C. § 2011 et seq., under which the federal government pays the costs of the benefits and a portion of the administrative costs.

2. As a condition of receiving federal funds, Wisconsin is required to operate AFDC, Food Stamp and Medical Assistance programs which conform with the requirements of the Social Security Act, the Food Stamp Act and implementing federal regulations.

3. State law has substantially the same provisions as federal law regarding notice to AFDC recipients, sec. 49.19(13), Stats. (1979), as amended by ch. 93, Laws of 1981.

4. Fair hearing requirements are governed by sec. 49.50(8), Stats. (1979), as amended by ch. 93, Laws of 1981, and section PW-PA 20.18 Wis.Adm.Code (1978).

5. AFDC cases in which benefits are denied, reduced or terminated due to an initial eligibility determination, a change in a client's circumstances or a redetermination of a client's eligibility require a notice which is adequate if it meets the following requirement:

> "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested. 45 C.F.R. § 205.10(4)(i)(B).

6. AFDC cases in which benefits are reduced or terminated due to changes in federal and/or state law require a

notice which is adequate if it meets the following requirement:

> When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued. 45 C.F.R. § 205.10(4)(iii).

7. MA cases in which benefits are denied, reduced or terminated due to an initial eligibility determination, a change in a client's circumstances or a redetermination of a client's eligibility require a notice which is adequate if it meets the following requirements:

> (a) A statement of what action the agency intends to take;
>
> (b) The reasons for the intended action;
>
> (c) The specific regulations that support ... the action;
>
> (d) An explanation of--

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing;

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested. 42 C.F.R. § 431.210.

8. MA cases in which benefits are reduced or terminated due to changes in federal and/or state law require a notice which is adequate if it meets the following requirements:

(a) A statement of what action the agency intends to take;

(b) The reasons for the intended action;

(c) ... the change in Federal or State law that requires the action;

(d) An explanation of--

. . . .

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested. 42 C.F.R. § 431.206.

9. FS cases in which benefits are denied due to an initial eligibility determination require a notice which is adequate if it meets the following requirement:

> Notice of denial. If the application is denied, the State agency shall provide the household with written notice explaining the basis for the denial, the household's right to request a fair hearing, the telephone number of the food stamp office, and, if possible, the name of the person to contact for additional information. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service. 7 C.F.R. § 273.10(g)(ii).

10. FS cases in which benefits are reduced or terminated due to a change in a client's circumstances or a redetermination of a client's eligibility require a notice which is adequate if it meets the following requirement:

> All State agencies shall use a notice of adverse action form designed by FNS. FNS may approve deviations from that form under the

same conditions deviations are granted for the application form, as specified in § 273.2(b). The notice of adverse action shall be considered adequate if it explains in easily understandable language: The proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing if the hearing official's decision is adverse to the household. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service. 7 C.F.R. § 273.13(a)(2).

11. In Wisconsin, all computations performed on client data when initial eligibility is determined, when a change in client data is processed or when eligibility is periodically redetermined are done by the Computer Reporting Network System (CRN) and are not performed manually at either the local or state levels.

12. When changes in federal and/or state law occur which affect eligibility, CRN processes all existing client data through new programs designed to implement the legal changes. No change is made in any client data. Changes of this type are referred to as "conversions."

13. Nineteen (19) separate changes required by OBRA and state law were incorporated by CRN on or about December 12, 1981, to be effective December 31, 1981.

14. Plaintiff Melissa Pflueger is an adult resident of Milwaukee, Wisconsin, who receives financial assistance under the AFDC program, Medical Assistance Benefits and Food Stamps for herself and her four minor children. Ms. Pflueger received a notice of termination dated October 16, 1981. The notice provided the following information:

a. Informed her that "effective October 31, 1981, your eligibility for financial assistance will terminate" (i.e., the action the agency intends to take.)

b. Told her the reason for the termination was: "You failed to furnish necessary information."

c. The specific law citation authorizing the agency's action. Both federal and state law are cited.

d. An explanation of her right to a hearing and the circumstances under which aid will be continued pending a hearing.

15. Melissa Pflueger's case was not affected by conversion processing conducted on or about December 12, 1981.

16. Plaintiff Geraldine Buckhanon is an adult resident of Milwaukee, Wisconsin, who receives financial assistance under the AFDC program, Medical Assistance Benefits, and Food Stamps for herself, her husband and four minor children.

17. Prior to November 13, 1981, Geraldine Buckhanon was eligible for assistance as a member of an AFDC-U household.

18. Sometime between October 19, 1981, and November 13, 1981, Milwaukee DSS received a WIN status change notice indicating Geraldine's husband was employed full-time as of October 14, 1981, at $3.65 an hour.

19. On November 13, 1981, the caseworker called the client and explained to

her that she would no longer be eligible for AFDC-U because her husband was employed. She might, however, be eligible for stepparent aid. The client elected to be considered for stepparent aid. This fact was recorded in the case record.

20. On November 13, 1981, the caseworker acted in response to the client's wishes and processed a change. A notice of decision generated by CRN was sent to the client. A copy is attached to her affidavit as Exhibit A.

21. On November 13, 1981, the caseworker also sent a handwritten notice to the client informing her that she would no longer be eligible for AFDC-U. This notice stated in part: "Your husband is now employed and you are now only eligible for stepfather aid for your children. Your (Geraldine's only) wages are budgeted, but you do not get 30 1/3

exempt allowance only 18% for expenses." The worker had to issue this notice manually because a termination in CRN was not processed due to the client's request that the case not be terminated.

22. On December 1, 1981, Geraldine Buckhanon received a grant of $31.31.

23. On November 20, 1981, a change was processed by the CRN system. The work-related expense information was changed. In addition, the allocation of income information which is required for stepparent aid, and which was used to determine the grant level of $31.31, was entered on the wrong line of the CRN system. The result of this improper entry was to generate a case decision sheet which recorded the grant as increasing from $31.31 to $225.64.

24. The caseworker received the case determination sheet and discovered the error. A new change was processed to

correct the error on November 25, 1981. The error was not properly corrected, however.

25. The case determination sheet generated by the November 25, 1981, change was reviewed by the caseworker and the second error was discovered.

26. On December 1, 1981, a change was processed to correct the error. The income allocation was corrected by this change. The resulting amount of the grant was $56.96.

27. This case was not effected by the conversion on December 12, 1981.

28. Ms. Buckhanon had the right to have her aid continued at pre-reduction levels pending the outcome of a hearing at which she could contest any facts affecting her case.

29. Defendant Donald E. Percy is the Secretary of the Wisconsin Department of Health and Social Services (DHSS) and

as such is charged under the Wisconsin Statutes with supervision of the administration of the AFDC, Food Stamp and Medical Assistance programs in Wisconsin. Secs. 46.03(8), 46.206(1)(a), 49.45 and 49.50(2), Stats. (1979-80). His duties include promulgating and implementing regulations to insure compliance by the DHSS with the provisions of Title IV and XIX of the Social Security Act, the Food Stamp Act and applicable federal regulations. Secs. 46.03(23) and 49.50(2), (6), Stats. (1979-80).

30. Defendant Bernard J. Stumbras is the Administrator of the Division of Economic Assistance of DHSS and as such is charged with the supervision of the administration of the AFDC, Food Stamp and Medical Assistance programs in Wisconsin in conformity with the provisions of the Social Security Act, the Food Stamp Act, the applicable rules and

regulations of the federal government and the State of Wisconsin. His duties include responsibility for the development and issuance of manuals and instructions implementing the AFDC, Food Stamp and Medical Assistance programs in accordance with applicable federal and state law.

31. Defendant Kenneth Rentmeester is the Administrator of the Division of Health of DHSS and as such is charged with part of the supervision of the administration of the Medical Assistance program in Wisconsin in conformity with the provisions of the Social Security Act and implementing rules and regulations of the federal government and the State of Wisconsin.

32. Defendants Percy, Stumbras and Rentmeester and all other defendants have been, are presently and will continue to be acting under color of authority and

law of the State of Wisconsin in providing notices to plaintiffs.

II. Class Certification

In their motion for a class certification, plaintiffs requested leave to represent:

> All persons in Wisconsin whose AFDC, Food Stamp and/or Medical Assistance benefits have been, are being or will be denied, reduced or terminated without being provided an adequate written notice containing the specific reasons for and computations requiring such action.

Plaintiffs contended that the individual named plaintiffs met the requirements of Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure and asked the Court to allow this action to be maintained as a class action pursuant to Rule 23(b)(2).

Defendants opposed the motion. They contended that the representative parties' claims did not involve "questions of law or fact common to the class"

as required by Rule 23(a)(2). They also argued that the representative parties were not typical of the class as required by Rule 23(a)(1). In addition, they maintained that class certification under Rule 23(b)(2) was unnecessary because any relief afforded to the individual plaintiffs could be afforded to individuals similarly situated under the principle of stare decisis.

In reviewing the affidavits of the four individual plaintiffs and their Notice of Decision forms, the Court noted that only two of the individual plaintiffs--Rosetta Bailey and Mary Green--were affected by the OBRA changes. The other two individual plaintiffs--Geraldine Buckhanon and Melissa Pflueger--were not affected by the OBRA changes. Rather, the Notice of Decision forms they received reflected changes which were generated by changes in their individual

situations. Consequently, the Court divided plaintiffs' proposed class into two groups: those individuals who received notices informing them of an aid reduction or termination brought about by OBRA ("the conversion plaintiffs"), and those individuals who received notices informing them of an aid reduction or termination brought about by changes in their individual situations ("the non-conversion plaintiffs").

The Court had no difficulty in finding the class of conversion plaintiffs so numerous that joinder of all members would be impractical. Rule 23(a)(1). Nor did it have any difficulty in finding that the representative parties would fairly and adequately protect the interests of the class of conversion plaintiffs. Rule 23(a)(4).

The defendants contended that questions of law or fact common to the class

of conversion plaintiffs did not exist because three different programs (i.e., AFDC, FS, MA) are involved in this action. The Court rejected this argument after finding that the issues presented in this suit relate to the notices given to terminate or reduce benefits under these programs, and not to the programs themselves. Because the notice "foldout" (attached to this memorandum and order as Exhibit 1) was sent to all conversion plaintiffs, and because plaintiffs were primarily challenging the use of this foldout, the Court found questions of law common to the subclass of conversion plaintiffs exist. Rule 23(a)(2). In addition, the Court found the claims of plaintiffs Rosetta Bailey and Mary Green to be typical of the claims of the subclass of conversion plaintiffs. Rule 23(a)(2).

The Court also found that the requirements of Rule 23(b)(2) were satisfied because the defendants had acted on grounds generally applicable to the subclass of conversion plaintiffs. Also, because injunctive relief would require defendants to send new notices to some or all class members, the Court rejected defendants' contention that the principle of stare decisis rendered class certification unnecessary. Accordingly, the Court granted plaintiffs' motion for certification of a class insofar as it pertained to the conversion plaintiffs.

With respect to the non-conversion plaintiffs, the Court held that the plaintiffs had not demonstrated that the claims of plaintiffs Buckhanon and Pflueger were typical of a subclass consisting of all individuals whose aid had been reduced, denied or terminated as a result of changes in individual circum-

stances. Accordingly, the Court denied plaintiffs' motion for class certification insofar as it related to that group.

[1] After dividing plaintiffs' proposed class into two subgroups and after granting, in part, and denying, in part, plaintiffs' motion for class certification, the Court ordered plaintiffs to draft an order identifying the conversion class. On January 8, 1982, plaintiffs submitted a proposed order which identified the class as follows:

> All persons in Wisconsin whose AFDC, Food Stamp and/or Medical Assistance benefits have been, are being or will be denied, reduced, or terminated on account of the implementation of the Omnibus Budget Reconciliation Act without being provided adequate written notice containing the specific reasons for and computations requiring such action.

Defendants contend the plaintiffs' revised class identification is overbroad because it includes aid recipients who

have yet to receive notices informing them of a reduction, denial or termination of benefits brought about by OBRA. Defendants contend the subclass of conversion plaintiffs should consist only of those individuals whose benefits were reduced or terminated as a result of the conversion which took place on December 12, 1981.

The Court agrees with defendants that plaintiffs' revised class identification goes beyond the scope of the Court's December 30, 1981 order. Because the State has not yet developed notices regarding those OBRA changes which were not included in the December 12, 1981 conversion (e.g., AFDC/MA strike policy), the Court is of the opinion that it should not at this time interfere with the defendants' attempts to develop adequate notices for those changes. In addition, because the foldout notices

were sent only to present aid recipients to explain the changes in the law, the Court is of the opinion that the claims of applicants who have applied for, but been denied aid as a result of the new law, raise issues different from those issues raised by recipients who received the foldout notices. Accordingly, the class certified by the Court will not include these individuals.

Based on the foregoing, the Court rejects plaintiffs' revised class identification. Rather, the Court shall consider the claims of:

> All persons in Wisconsin whose AFDC, Food Stamp, and/or Medical Assistance benefits have been or are being reduced or terminated as a result of the implementations of those provisions of the Omnibus Budget Reconciliation Act which are reflected in the foldout and accompanying notices generated by the defendants' December 12, 1981 conversion.

III. Motion for Preliminary Injunction--Conversion Class

A preliminary injunction may not be granted unless it is shown that:

> (1) the plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendants; (3) the plaintiffs have at least a reasonable likelihood of success on the merits; and (4) the granting of a preliminary injunction will not disserve the public interest. Fox Valley Harvestore v. A. O. Smith Harvestore Products, 545 F.2d 1096, 1097 (7th Cir. 1976).

Plaintiffs bear the burden of showing that each of these prerequisites to injunctive relief is satisfied. The Court will begin its analysis by determining whether plaintiffs have demonstrated at least a reasonable likelihood of success on the merits of their claims.

A. Likelihood of Success

Plaintiffs contend that the notices sent to aid recipients after the December 12, 1981 conversion fail to indicate the specific reasons for the State's actions, the substance of any applicable statutory or regulatory authority, the information relied upon for taking the actions and the calculations supporting the actions. Plaintiffs further contend that the defendants' use of these notices has denied them the opportunity to understand, determine the accuracy of and make knowledgeable decisions as to whether they should challenge the defendants' actions. Plaintiffs also contend they are being forced to choose between failing to appeal incorrect reductions or terminations of benefits, and risking recoupment of such benefits if they fail to appeal what turns out to be a correct decision.

Finally, plaintiffs contend the foldout accompanying the defendants' notices is confusing and contains too much unnecessary information.

Defendants argue it was not necessary for them to provide calculations with the conversion notice. Because the December 12, 1981 conversion merely required them to design new programs to implement OBRA and corresponding Wisconsin law changes, ch. 93, Laws of 1981, and to process that information along with existing client data through the computer, defendants contend the conversion resulted in no factual errors. Therefore, they maintain, it was unnecessary for them to include any calculations in the notices.

Defendants also contend that the notices were adequate because they met the requirements set forth in the Code of Federal Regulations for conversion

notices. The Court will not specifically address this contention because the Court construes the code regulations as requiring compliance with the requirements of due process.

In determining the adequacy of the conversion notices at issue in this action, the Court will rely on three decisions from the Seventh Circuit Court of Appeals: Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied 424 U.S. 978, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976); and Dilda v. Quern, 612 F.2d 1055 (7th Cir. 1980), cert. denied 447 U.S. 935, 100 S.Ct. 3039, 65 L.Ed.2d 1130 (1980).

In Vargas, aged, blind and disabled recipients of aid from the Illinois Department of Public Aid under Title XVI

of the Social Security Act, 42 U.S.C. § 1381-85 filed suit to challenge the sufficiency of the notice used to inform them of reductions or terminations of benefits. The court of appeals held that the notice of proposed termination or reduction in aid did not comport with procedural due process because it did not give reasons for the proposed action. 508 F.2d at 489. In reaching that decision, the Court rejected the defendants' contention that the notice met due process standards because it advised the recipient that he could learn the reason for the proposed reduction or termination of benefits by contacting his caseworker. Id.

In Banks, food stamp recipients in Illinois filed suit to challenge the adequacy of the notice informing them of reductions of food stamp benefits brought about by a change in the method used for

calculating benefits. That change, like the changes in the case at bar, was triggered by a change in the law. Plaintiffs sought and obtained a preliminary injunction from the district court enjoining defendants from reducing the food stamp benefits of the members of the plaintiff class "until such time that the members of the plaintiff class are provided with adequate advance notice of the reasons for the proposed reduction, including a full statement of all income and deductions therefrom, taken into account in determining net food stamp income." The defendant attempted to comply with the district court's order by conducting a face-to-face interview with each food stamp recipient affected by the change in the law to secure and to calculate food stamp income under the new method. After the recipient completed a two-page application for food stamps, the case-worker

computed the recipient's income and deductions to arrive at a net food stamp income figure. Those members of the plaintiff class whose food stamp benefits were to be reduced on the basis of information obtained in the interview were then to be sent a notice containing the following statement:

> Your eligibility for food stamps has been redetermined and your net food stamp income has been computed. Your purchase requirement will be based on the net income basis of issuance as required by federal regulation (7 CFR 271.3).

Upon motion of the plaintiffs, the district court also found this notice insufficient.

On appeal, the Seventh Circuit Court of Appeals affirmed. It stated:

> The Notices sent to this class did not contain a breakdown of income and deductions so that the recipients could determine the accuracy of the computations. Since the Notices do not inform recipients of what factors are relevant in determining net food stamp income, the plaintiff class cannot inform

> caseworkers of expenditures that should be used. Similarly, the plaintiff class was not informed by chart or otherwise of the allotment and purchase prices for different size households based on their food stamp income, so that members of the class can ascertain whether they are receiving the correct amounts of coupon allotment.
>
> Both Goldberg [v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)] and Vargas require detailed notice of adverse action as a protection against agency error and arbitrariness. Because the calculation of food stamp benefits under the income method requires an individualized determination of income, expenses and deductions for each recipient, due process requires full and adequate prior written notice. 525 F.2d at 842.

Finally, in Dilda, a 1980 case, welfare recipients brought suit to challenge the practice of the Illinois Department of Public Aid of reducing or cancelling benefits under Title IV of the Social Security Act, 42 U.S.C. § 601 et seq., through "rebudgeting" without notifying them of the method by which the revised reduction or cancellation was calculated.

The district court found the defendants' original notice inadequate under the due process clause for failing to include an explanation of how and why the plaintiff's AFDC grant was recomputed. Pursuant to the district judge's order, the defendant submitted and the court approved the following forms of notice:

> DEDUCTIONS
>
> Your increased earned income from _____ (new net amount after deductions $_____) is being applied to your needs. Your increased earned income (new net amount after deductions--$_____) is being applied to your needs.
>
> CANCELLATIONS
>
> Because of your increased unearned income from ____ (new amount--$____) your income now exceeds your income maintenance needs.
>
> Because of your increased earned income (new gross amount before deductions--$_____), your income now exceeds your income maintenance needs. Id. at 1056.

On appeal, plaintiffs contended that the defendants' notice failed to comport

with certain federal regulations and due process. They argued that the defendants' notice should have included a copy of the worksheets upon which the defendants based their decisions. The court of appeals agreed with the plaintiffs. Even though the notice stated the ultimate reason for the reduction or cancellation of benefits, the court of appeals found it did not comport with due process. The notice's major flaw, according to the court, was its failure to provide the recipient with a breakdown of income and allowable deductions. Accordingly, it ordered defendants to include photocopies of their workpapers with the notices informing recipients of a reduction or termination of benefits.

In the case at bar, the notice and accompanying foldout were used to explain numerous changes in the law. Because the information provided to recipients

depended in large part on which OBRA provision affected them, it will be necessary for the Court to examine the OBRA changes separately. However, before examining each of the changes brought about by OBRA, the Court will address the plaintiffs' contention that the foldout and notice are inadequate because they are confusing and contain too much unnecessary information.

The Court agrees with the plaintiffs that the foldout is confusing and contains too much unnecessary information. The notice accompanying the foldout does not inform the recipient which section of the foldout affects his level of aid. Therefore, the recipient must read the entire foldout to determine which section applies to him. Furthermore, because the notice does not refer to a specific section of the foldout, it is conceivable that a recipient could read through the

entire foldout and not know which section or sections affect him.

The Court is not of the opinion, however, that the confusing nature of the layout or the presence of unnecessary information renders the defendants' entire December 12, 1981 conversion invalid. In some instances, a recipient could determine the exact reason for a change in the level of benefits. Therefore, the Court will look at each of those changes in the law brought about by OBRA which are reflected in the foldout to determine whether the section of the notice pertaining to each change is so confusing, contains so much unnecessary information or lacks so much necessary specific information that it violates due process.

As indicated in the parties' stipulated facts, nineteen (19) separate changes required by OBRA and state law

were incorporated by CRN on or about December 12, 1981, to be effective December 31, 1981. A short description of these nineteen changes is attached to Bernard J. Stumbras' December 28, 1981 affidavit as exhibit A. The Court will refer to the changes using the same numbering system as Mr. Stumbras used.

It will not be necessary for the Court to discuss each of the nineteen changes listed on the Stumbras affidavit. Plaintiffs acknowledge change 14 is not at issue in this action because it is not an OBRA change. Plaintiffs also acknowledge changes 15 through 19 are not at issue because they did not generate computer notices to aid recipients. (Plaintiffs' 1-6-81 memorandum, p. 19.)

One other change need not be discussed. Change 5, which pertains to the new strike policy for AFDC and MA recipients, will result in no denials of aid

until after January 31, 1982 because a recipient must be on strike on the last day of the month, i.e., January 31, 1982, in order to be denied benefits. Because this change was not reflected in the notices or foldout sent out after the December 12, 1981 conversion, it is not included in the plaintiffs' class.

The Court will now address the other changes.

Change 1. AFDC 150% gross income test.

[2] This OBRA provision excludes from AFDC benefits those persons whose gross earned income exceeds 150 percent of the state's assistance standards for families the size of the recipient's family. If an AFDC recipient and his aid terminated as a result of this provision, his notice from the defendants stated "Income is $_____ above limit allowable for eligibility. 49.19(5)(a) Stats, 45

CFR 233.20(a)(3)," or "Income exceeds the gross income limit. 49.19(4)(es), Stats., 45 CFR 233.20(a)(3)(xiii)."

Section 1 of the foldout summarizes the change in the law and also informs the recipient that in computing his gross income, the state did not count Supplemental Security Income (SSI) Payments, payments made under the low income Energy Assistance Program, Food Stamps "and other benefits when federal law says that the benefit may not be counted as income for a welfare program." In addition, section 1 of the foldout contains a table showing the maximum monthly gross income limit by family and area.

Plaintiffs contend the notice and accompanying foldout do not contain enough case specific information for the recipient to determine the accuracy of a determination of eligibility. Specifically, they contend the notice and

foldout are insufficient because they do not indicate:

a. the amount of the individual's gross earned income used to make the determination;

b. the month in which that gross income was received;

c. the number of persons in the household for which eligibility is being determined; and

d. the gross income standard applied to the family; and

Plaintiffs further contend that those notices informing recipients only that their "income exceeds the gross income limit" are insufficient because they do not give the amount by which the

individual's gross earned income exceeds the limit.

The Court finds the plaintiffs' objections valid. Because the foldout does not indicate the recipient's geographic area, the amount of gross income upon which the defendants based their decision and the month in which the gross income was received, it would be impossible for a recipient, even if he knew the number of persons the defendants used to calculate his aid eligibility, to determine the accuracy of the agency's decision.

Based on the foregoing, the Court finds plaintiffs have demonstrated a reasonable likelihood of success on their claim that the OBRA notices setting forth the new 150 percent income test fail to comport with due process.

Change 2. AFDC/MA $75 Earned Income Deduction.

[3] This OBRA provision limits the amount of earned income which may be disregarded as work-related expenses. Previously, a recipient's actual work-related expenses could be deducted from gross income to determine eligibility for AFDC. Under the new law, persons who work full-time (i.e., 30 hours or more per week) will be allowed a standard work expense disregard of $75.00. Persons who work part-time (i.e., less than 30 hours per week) will be allowed a deduction of 18 percent of gross income or $75.00, whichever is less.

Individuals affected by the new standard allowance were provided a notice and foldout. If their AFDC grant was reduced as a result of the standard deduction, the notice read "Allowable work-related expenses are less. 49.19(5)(a)2., Stats. 45 C.F.R. 233(20)(a)(11)." If the standard

deduction caused the case to be terminated from AFDC, the notice read "Income is $_____ above limit allowable for eligibility. 49.19(5)(a), Stats., 45 C.F.R. 233.-20(a)(3)." The actual amount of excess was included.

Because the $75.00 earned income deduction for work expenses is used to compute a recipient's adjusted net income, plaintiffs contend proper notice must include not only a breakdown of the income and deduction amounts relied upon but the calculations used to determine an individual's AFDC grant amount as well. They maintain it is impossible for a recipient to determine the accuracy of the defendants' actions unless he knows the gross income figure used or the calculations made to compute eligibility. They further contend that part-time workers received inadequate notice because the notices they received did not

indicate the actual amount of work expenses which were deducted from gross income.

Defendants maintain that the notices sent to each recipient directed the recipient to section 2 of the foldout. Because section 2 of the foldout explains the use of the disregard for full-and-part-time employment and defines full-and-part-time employment, they contend the notice was adequate.

Contrary to defendants' assertion, nothing in defendants' notice refers a recipient to section 2 of the foldout. Consequently, a recipient whose aid was terminated because his work-related expenses exceeded the legal maximum and whose notice stated "income is $____ above limit allowable for eligibility," would not have known whether his aid termination was "keyed" to section 1, 2 or 3 of the foldout.

The Court also rejects the State's contention that no individualized calculations were necessary to accomplish the conversion resulting from section 2. To complete the conversion, the State had to create a program capable of applying the new law to the individual data supplied by each recipient. Therefore, while no human input was necessary once the program was created, the computer had to "individually" examine each recipient.

In light of the foregoing, the Court finds that plaintiffs have demonstrated a reasonable likelihood of succeeding on their claim that the "section 2" foldout notices fail to comport with due process.

Change 3. AFDC Vehicle Policy.

Change 4. Medical Assistance Vehicle Policy.

[4] Prior to the enactment of OBRA, no more than two motor vehicles could ordinarily be disregarded as assets for

purposes of determining eligibility for AFDC and MA. Under the new law, equity value over $1,500.00 in a first vehicle is included in a recipient's asset limit, as is all equity value in other vehicles.

Individuals affected by these sections were told on their notice that "Assets are $____ above allowable limit. 49.-14(4)(bm), 49.46(1)(a)1., Stats., 45 C.F.R. 233.20(a)(3)." The exact amount of excess was stated. Section 5 of the foldout explains the asset limit and the new vehicle policy. It defines first vehicle and equity value and tells recipients to contact their case aide to obtain the equity value of their vehicles.

Plaintiffs contend that the notices used for these sections are inadequate because they contain no indication whatsoever that it is the individual's equity in an automobile which has rendered him

ineligible for AFDC and/or MA benefits. In addition, plaintiffs contend the notices are inadequate because they fail to provide case-specific information such as equity value.

The Court finds the plaintiffs' arguments persuasive. Because neither the notice nor the foldout informs the recipient that it is the equity value of his car which has pushed his assets over the asset ceiling, a recipient affected by these sections may not know that it is the value of his car which led to the termination of eligibility.

The Court is also of the opinion that due process is not satisfied by merely defining equity value and informing a recipient that he can obtain the equity value as computed by the State by contacting his caseworker. Determination of equity value of an automobile requires individual analysis of each recipient's

car. Consequently, due process requires each recipient be told of the figures utilized to compute equity.

That section 5 informs recipients they can obtain the equity value by contacting a caseworker does not render the notice valid. A referral to the welfare department for the specific information relied upon in an individual's case is insufficient to meet due process standards. Vargas, 508 F.2d at 489.

The Court also notes that neither the notice nor foldout indicates how the State computed the market value of a recipient's automobile. Without this information, a recipient has no way of knowing the basis for the defendants' decision.

Based on the foregoing, the Court finds that plaintiffs have demonstrated a reasonable likelihood of succeeding on their claim that the notices setting

forth the new AFDC/MA vehicle policy fail to comport with due process.

Change 5. AFDC/MA Strike Policy.

The Court has previously determined that no class members have been affected by this OBRA provision. Accordingly, the Court need not analyze this change at the present time.

Change 6. $1,000.00 Asset Limit for AFDC/MA benefits.

[5] Prior to the enactment of OBRA, the asset limit for AFDC and MA recipients was $1,500.00. Under the new law, this limit is $1,000.00.

Individuals affected by this change in the law were sent notices which stated: "Assets are $_____ above limit allowable. 49.19(4)(bm); 49.46(1)(a)1., Stats.; 45 C.F.R. 233.20(a)(3)." Recipients were given the exact amount of asset overage. Section 5 of the foldout

explains the new asset limit and the change from the old law.

Plaintiffs contend this type notice is inadequate because it fails to include a definition of the term "asset," the nature of the asset which was relied upon to disqualify the family for AFDC and the value of the asset which rendered the family ineligible for AFDC.

The Court rejects plaintiffs' contention that the work "asset" is confusing or difficult to understand. The defendants cannot be expected to inform recipients of complex changes in the law without using words understandable to an ordinary layman with a sixth grade education.

The problem with the notice used to inform recipients of changes in the asset limitation lies in the language of section 5 of the foldout. If that section did not summarize both the change in the

asset ceiling and the change for vehicle treatment, a recipient with assets over $1,000.00 would know why his aid was terminated. Because the notice informs recipients of the amount by which their assets exceed the $1,000.00 limit, a recipient could also determine--by adding $1,000.00 to the figure supplied to him by defendants--the value of his assets as computed by the defendants.

Unfortunately, section 5 of the foldout relates to both the new asset ceiling and the change in vehicle policy. Consequently, a recipient notified that his benefits were being terminated because his "assets are ... above allowable limit," might not know the basis of the State's action.

Based on the foregoing, the Court finds that plaintiffs have demonstrated a reasonable likelihood of succeeding on their claim that OBRA notices setting

forth the new asset ceiling failed to comport with due process.

Change 7. Lump Sum Payment.

Under this provision, families who receive any lump sum payment of income other than that which has been budgeted against their regular AFDC grant will be considered ineligible for AFDC benefits for a period of time determinable by dividing the amount of that payment by the amount of the family's AFDC assistance standard. In addition, the amount of the lump sum payment will be included in the assets of MA and FS recipients.

The capability to enter lump sum payments as unearned income for AFDC and assets for medical assistance and food stamp was placed in CRN on or about December 12, 1981. Although the capability was entered that date, this provision was not part of the December 12, 1981 conversion, and was not reflected on

the foldout. Consequently, defendants contend this provision does not fall within the certified class.

The Court agrees. The class certified by the Court includes only those recipients who were affected by the December 12, 1981 conversion and who received the defendants' foldout. Accordingly, the Court will not consider this provision at this time.

Change 8. AFDC Dependent Adult/Child Care.

Change 12. MA Dependent Adult/Child Care.

[6] Prior to the enactment of OBRA, actual reasonable child care expenses were deducted from earned income to determine eligibility for AFDC. OBRA substitutes a maximum deduction of $160.00 per month per child for a recipient who is employed full time and a maximum deduction of $120.00 per month per child for a recipient employed part time.

This change also applies to MA recipients.

If a recipient's AFDC grant was reduced as a result of the new child care provisions, he received a notice containing the following statement: "Child care costs are less/unneeded. 49.19(5)(a)3., Stats.; 45 C.F.R. 233.20(a)(11)." Those recipients whose AFDC was terminated as a result of these provisions received a notice which stated: "Income is $_____ above limit allowable for eligibility. 49.19(5)(a), Stats.; 45 C.F.R. 233.20(a)(3)." The exact amount of excess was listed. Those recipients whose MA was terminated as a result of these provisions received a notice which stated: "Income is $_____ above limit allowable for eligibility." 49.46(1)(a) or 49.47(4)(c), Stats.; 42 C.F.R. 435.700 and 435.711." The exact amount of excess

was listed. Section 3 of the foldout summarizes these changes in the law.

Plaintiffs contend the notice pertaining to these provisions is inadequate. Because the amount of child care costs is a deduction, the amount of which depends on the facts of each case, plaintiffs argue that due process requires the following case specific information:

a. Whether the agency considers the individual a full-time or part-time worker;

b. the actual amount of child care expenses used in determining the child care deduction;

c. number of children requiring child care;

d. the amount of the child care deduction applied in the recipient's case; or

e. the calculations used in the individual's case to compute eligibility or amount of benefits.

The Court agrees with plaintiffs that the changes engendered by these OBRA provisions are changes which require case specific information. Defendants' failure to provide recipients affected by these sections with case specific information makes it impossible for a recipient to know exactly how defendants reached their decision.

Based on the foregoing, the Court finds that plaintiffs have demonstrated a reasonable likelihood of succeeding on their claim that those recipients whose aid was terminated or reduced as a result

of these provisions were denied due process.

Change 9. AFDC Four Month $30.00 and 1/3 Earned Income Disregard.

[7] This OBRA provision reduces the $30.00 plus 1/3 earned income disregard by applying it to net income (i.e., gross income less child care and work expense deductions) rather than to gross income as formerly done. In addition, the earned income disregard is now terminated after four months. At the end of four months, the deduction is no longer applied to reduce the family's budgetable earned income. Section 4 of the foldout summarizes the changes in the law.

In their supplemental memorandum, defendants state that no notices pertaining to this section have been mailed, apparently because the earliest date this section can be implemented is four months

after October 1, 1981--the date OBRA was enacted.

Because defendants have not yet implemented this OBRA section or developed a notice pertaining to this section, the Court is of the opinion that judicial intervention at this time in the drafting of a notice would be premature. It should be noted, however, that the Court's refusal to interfere at this time with the OBRA provision discussed in this section is based on defendants' representation that no recipients have been affected by this OBRA change. The Court interprets defendants' statement in their supplemental memorandum as indicating that neither the four month limitation nor the net income provision is in effect at this time.

Based on the foregoing, the Court finds that no class members have been affected by this provision. Accordingly,

the Court denies at this time plaintiffs' request for preliminary injunctive relief with respect to those OBRA changes discussed in section 4 of the foldout.

Change 10. MA Maternity Care.

Change 11. AFDC Maternity Care and pregnancy allowance.

[8] Under this OBRA provision, a pregnant woman with no other children becomes eligible for AFDC only after the beginning of her seventh month of pregnancy. Beginning at the seventh month of pregnancy, the woman receives $60.00 in addition to the grant she would be receiving for herself. If a pregnant woman has other dependent children, and is otherwise eligible for AFDC, she will receive the monthly allowance of $60.00 beginning in her seventh month of pregnancy. In the MA program, an unmarried woman with no other children may be eligible for MA after her pregnancy is

verified if she meets financial eligibility requirements for AFDC.

Those AFDC recipients whose aid was terminated or reduced as a result of these provisions received a notice which stated one of the following: "Pregnancy is not in month 7, 8 or 9. 49.19(4)(g); 49.47(4)(a)2.; 49.46(1)(a) 1m, Stats."; or "Pregnancy allowance has been reduced. Sec. 49.19(4)(g), Stats."; "The pregnancy allowance no longer applies. Sec. 49.19(4)(g), Stats." Those MA recipients whose aid was terminated or reduced as a result of these provisions received a notice which stated one of the following: "Is not aged, blind, disabled or under 18. 49.47(4)(a), Stats."; "No person is determined eligible. 49.19(4)(g); 49.47(4)(a)"; or "Pregnancy is not in month 7, 8 or 9. 49.19(4)(g); 49.47(4)(a)2.; 49.46(1)(a)1m, Stats."

Section 6 of the foldout summarizes the changes in the law.

Plaintiffs contend the foldout and notices pertaining to these OBRA provisions are inadequate because they do not clearly indicate that every pregnant woman in at least her seventh month of pregnancy is eligible for $60.00 in addition to her regular grant, and because they fail to advise the reader that MA eligibility begins as soon as pregnancy is confirmed and not in the seventh month of pregnancy.

The Court rejects plaintiffs' contention that section 6 and the corresponding notice are inadequate. When read together, the foldout and notice inform the aid recipient of the defendants' proposed action and the reason for the action. Moreover, these OBRA provisions, unlike many of the provisions previously discussed, do not require mathematical

calculations. Consequently, the likelihood that an error occurring is less and the likelihood of an error being discovered by a recipient is greater.

Based on the foregoing, the Court concludes that plaintiffs have not demonstrated a reasonable likelihood of succeeding on their claim that the defendants denied plaintiffs due process when they informed aid recipients of the OBRA provisions discussed in section 6 of the foldout.

[Change 12. Previously discussed.]

Change 13. 18-21 year olds ineligible for MA.

[9] Under this OBRA provision, low income individuals between the ages of 18 and 21 are no longer eligible for MA simply on the basis of their age. Rather, to maintain eligibility an individual must meet the income and asset limitations and fall into one of the

categories listed in section 7 of the foldout, which summarizes the change in the law. Those recipients affected by this provision received, along with the foldout, a notice informing them that aid was being terminated because "He/She is 18-21 years old. 49-47(4), Stats."

Because section 7 of the foldout adequately explains the change in the law and because the change requires no mathematical calculations, the likelihood of an error occurring is less and the likelihood of an error being discovered by a recipient is greater. Accordingly, the Court finds that notice and foldout adequately inform the aid recipient of the defendants' action and the reasons for that action.

Based on the foregoing, the Court concludes that plaintiffs have failed to demonstrate a reasonable likelihood of succeeding on their due process claim

relating to OBRA provisions discussed in section 7 of the foldout.

In summary, the Court has found that plaintiffs have demonstrated a reasonable likelihood of succeeding on their due process claims arising from the adequacy of the notices pertaining to reductions or terminations of aid resulting from the following OBRA provisions:

1. 150% Gross Income Test
2. $75.00 earned income deduction
3. AFDC Vehicle Policy
4. MA Vehicle Policy
6. $1,000.00 Asset Limitation
8. AFDC Child Care
12. MA Child Care

In addition, the Court has found that plaintiffs have not demonstrated a reasonable likelihood of succeeding on

their due process claims arising from the following OBRA provisions:

5. AFDC/MA Strike policy

7. Lump Sum Payment

9. AFDC 4 month $30.00 plus 1/3 income deduction

10. MA Maternity Care

11. AFDC Maternity Care and Pregnancy Allowance

13. 18-21 year old MA eligibility

Finally, because plaintiffs do not allege defendants' implementation of the following OBRA provisions denied them due process, the Court will not enjoin defendants from carrying them out at this time.

14. FS New Utility Standard

15. Summary of updates to letter file codes

16. MA new 4 month extension logic

17. Conversion bypass of 4 month extension

18. Removal of IMS edit for child care entries

19. Treatment of earned income in MA

B. Irreparable Injury

[10] Plaintiffs contend that all members of the certified class will be irreparably injured if an injunction is not issued. They contend that AFDC recipients receive grants in amounts which are 85 percent of what has been determined to be a minimum subsistence amount. Consequently, they argue that any loss of benefits poses a threat to their means of subsistence. They further contend that MA recipients will also be irreparably injured because their eligibility is based, for the most part, on the AFDC Assistance Standards. Finally, they contend Food Stamp recipients will be irreparably injured by a wrongful loss of benefits because their eligibility is based on federal poverty guidelines.

Defendants contend plaintiffs will not be irreparably injured if an injunction is not issued. They argue that plaintiffs have ignored the differences in the degree of possible harm which could befall recipients of aid under the three programs. Specifically, they contend that a denial or reduction of MA benefits will not result in the "brutal need" the Supreme Court discussed in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). They further contend FS recipients will not be irreparably injured because FS benefits would increase as a result of reductions in AFDC benefits.

The Court finds defendants' arguments without merit. Both the Supreme Court and Seventh Circuit Court of Appeals have held that a termination of welfare pending resolution of a controversy over eligibility constitutes

irreparable harm; Goldberg v. Kelly, 397 U.S. at 264, 90 S.Ct. at 1018; Banks v. Trainor, 842 F.2d at 842. Because an improper reduction in benefits would also deprive an AFDC recipient of the very means by which he lives, the Court finds that those class members whose AFDC benefits were terminated or reduced without proper notice, will be irreparably injured if an injunction is not issued.

Inasmuch as eligibility for MA is based, to a large degree, on AFDC Assistance Standards, the Court further finds that those class members, whose MA benefits were terminated or reduced without proper notice, will be irreparably injured if an injunction is not issued.

Finally, because FS recipients are currently existing below the poverty level and, therefore, are dependent on aid for their subsistence, the Court also

finds that they will be irreparably injured if an injunction is not issued.

C. Balancing of Harms

Plaintiffs maintain that the irreparable injury they would suffer if an injunction is not issued far outweighs the costs defendants would incur in generating adequate notices and continuing benefit levels pending such notice. To support their contention they rely primarily on the following language from the Seventh Circuit Court of Appeals' decision in Banks v. Trainor:

> Defendants state that because of the preliminary injunction and modified preliminary injunction they are presently forced to pay approximately 1.6 million dollars per month in food stamp benefits in excess of the amount to which food stamp recipients in Illinois are entitled. This unfortunate situation can be speedily remedied by their compliance with the modified injunction which we conclude was properly entered. 525 F.2d at 843.

Notwithstanding the Seventh Circuit's holding in Banks, defendants contend the harm they will suffer if an injunction is issued outweighs the harm plaintiffs will suffer if an injunction is not issued. Specifically, defendants contend that the cost of unbudgeted benefits, the cost of compliance with the injunction, the possible loss of federal revenue and the possible delays in the implementation of other laws all favor the denial of plaintiffs' motion.

The Court recognizes that the State of Wisconsin will incur substantial costs in continuing benefits at pre-OBRA levels while complying with due process. It also recognizes that the State will incur costs in preparing new notices and programs which comply with due process. These costs can be minimized, however, by rapidly developing notices which comply with due process. Furthermore, because

the Court is not persuaded that an injunction will cause the State to lose federal funding or cause it to postpone implementation of other programs, the Court also rejects these arguments.

Based on the foregoing, the Court finds the harm plaintiffs would suffer if an injunction is not issued outweighs the harm defendants will suffer by the issuance of an injunction.

D. Public Interest

The Court also finds that the public interest will not be disserved by the issuance of an injunction. Compliance with due process benefits not only those whose benefits were wrongfully terminated or reduced. All citizens benefit when the Constitution is upheld.

Based on the foregoing, the Court finds that plaintiffs have met all four prerequisites required for preliminary

injunctive relief with respect to OBRA changes 1, 2, 3, 4, 6, 8, 12. Accordingly, plaintiffs' motion for a preliminary injunction with respect to those sections is hereby granted. Plaintiffs' motion for a preliminary injunction enjoining all other OBRA provisions referred to in the Stumbras affidavit (i.e., 5, 7, 9, 11, 13, 14-19) is hereby denied.

IV. Motion for Preliminary Injunction--Geraldine Buckhanon and Melissa Pflueger

Although the Court has refused to certify a class consisting of all non-conversion plaintiffs, the question remains whether Geraldine Buckhanon and Melissa Pflueger are entitled to injunctive relief as individuals.

The Court has examined the notices sent to Geraldine Buckhanon and Melissa Pflueger and those portions of

the parties' briefs and memoranda which deal with their claims. Because the arguments set forth by the parties with respect to these plaintiffs' claims were based on the assumption that they would be members of a class, the Court will require the parties to tailor their arguments to these individuals' claims before ruling on their motions. Accordingly, the Court hereby denies plaintiffs' Geraldine Buckhanon and Melissa Pflueger's motions for a preliminary injunction without prejudice and directs plaintiffs' counsel to notify the Court as soon as possible if they still wish to seek injunctive relief for these individuals. At that time, the Court will establish an accelerated briefing schedule.

V. Conclusion

Based on the foregoing, the Court grants, in part, and denies, in part, plaintiffs' motion for class certification. The class certified by the Court shall consist of:

> All persons in Wisconsin whose AFDC, Food Stamp, and/or Medical Assistance benefits have been or are being reduced or terminated as a result of the implementation of those provisions of the Omnibus Budget Reconciliation Act which are reflected in the foldout and accompanying notices generated by the defendants' December 12, 1981 conversion.

In addition, the Court hereby grants, in part, and denies, in part, the plaintiff class members' motion for a

preliminary injunction, and orders defendants to reinstate to their original level the AFDC, MA, and FS benefits of those members of the plaintiff class whose aid was reduced or terminated as a result of any of the following OBRA provisions:

1. 150% Gross Income Test
2. $75.00 earned income deduction
3. AFDC Vehicle Policy
4. MA Vehicle Policy
6. $1,000.00 Asset Limitation
8. AFDC Child Care
12. MA Child Care

This injunction shall remain in effect until those class members whose aid was reduced or terminated as a result of these OBRA provisions are provided with adequate advance notice of the reasons for the proposed reduction or termination, including sufficient case specific information to inform these recipients of

the legal and factual basis of the defendants' proposed actions.

Further, the Court denies plaintiffs' motion for a preliminary injunction insofar as it pertains to all other OBRA provisions and denies without prejudice plaintiffs Buckhanon and Plfueger's motions for a preliminary injunction.

Finally, the Court orders defendants to submit to the Court and opposing counsel proposed notices which comply with this order by January 22, 1982.

Office - Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (VOLUME III)

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
of Wisconsin

Attorneys for Petitioners

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Exhibit A

(Buckhanon v. Percy,
C.A. 81-C-1601, 1/14/82)

Explanation of Program Changes

THIS EXPLANATION AND THE NOTICE OF DECISION LETTER MUST BE READ TOGETHER AS ONE DOCUMENT. READ BOTH CAREFULLY.

The federal Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35) signed into law by President Reagan on August 13, 1981, contains changes in the Aid to Families with Dependent Children (AFDC), Food Stamp and Medical Assistance Programs. Wisconsin is required to comply with the federal changes in these programs. Chapter 93, State Laws of 1981, made these changes in Wisconsin's law. The program changes which result from the above revisions in State or

Federal laws are identified in Section 1-7 of this Explanation of Program Changes.

Many changes in the AFDC and Medical Assistance program will change your grant amount or program eligibility status.

We have provided in Section 9 of this Explanation of Program Changes a description of your appeal rights and how to file your appeal.

With this Explanation of Program Changes, you have also received an individual Notice of Decision letter which identifies the reason(s) you are no longer eligible for AFDC or Medical Assistance or the reason(s) your benefits are being reduced.

If you wish to know the exact figures used in computing the change in your

grant, or if you need further clarification of the reasons for the change, call your case aide at the phone number shown on your Notice of Decision letter.

Below is an example of how AFDC grant calculations have changed for persons with earned income.

Present (12/81)	New (1/82)
Gross income	Gross income
-Minus "$30 and 1/3" disregard as an incentive to work	-Minus up to $75 See Section 2 of this Explanation
-Minus actual work related expenses	-Minus up to $160 for child care See Section 3

-Minus actual child care up to agency maximums	-Minus "$30 and 1/3" disregard See Section 4
+Plus unearned income	+Unearned income
=Budgetable Income	=Budgetable Income
AFDC Payment Allowance	AFDC Payment Allowance
-Minus Budgetable Income	-Minus Budgetable Income
=AFDC Grant	=AFDC Grant

Section 3

Dependent Care (e.g. Child Care)

If you were employed, you may have had all or part of the cost of care for a dependent child disregarded from your earned income.

Effective January 1, 1982, under Section 49.19(5)(a)3., Wis. Statutes if you work full-time (30 hours or more per week), no more than $160 per month for care of each dependent child may be disregarded from your earned income. The child needing care while you work must live in your home and also receive AFDC payments. If you work less than full-time (less than 30 hours per week), no more than $120 per month for care for each dependent child may be deducted from your earned income.

Your AFDC grant may be reduced due to the dependent care deduction limit. If a reduction occurs, your Notice of Decision will contain Reason C listed in Section 8 of this Explanation document.

If you become ineligible as a result of the dependent care limit, your Notice of

Decision will contain Reason A listed in Section 8 of this Explanation document.

Effective January 1, 1981, under Sections 49.46(1)(a)1. and 49.47(4), Wis. Statutes, and 42 CFR 435.700-.711 and 42 CFR 435.831, and the AFDC limits on dependent care costs are required for Medical Assistance applicants and recipients. If your allowable dependent care costs are reduced because of the new dependent care limits, you may be ineligible for Medical Assistance benefits. If you are ineligible for Medical Assistance for this reason, your Notice of Decision will contain Reason B listed in Section 8 of this Explanation document.

Section 4

"$30 and 1/3" Earned Income Disregard

In the past, if you worked we disregarded (did not count) the first $30, and 1/3 of

the remainder, of your GROSS earned income (earnings before taxes and other deductions).

Effective January 1, 1982, under Section 49.19(5)(a)4., Wis. Statutes, we subtract the "$30 and 1/3" from your NET earned income (gross income minus deductions). The net earned income is the money left after subtracting work related expenses and dependent care deductions from your gross earned income. This change in calculation of the "$30 and 1/3" earned income disregard will result in a smaller amount of money being disregarded.

If your AFDC grant is reduced because of a change in the "$30 and 1/3" disregard, your Notice of Decision will contain Reason H listed in Section 8 of this Explanation document.

If you are no longer eligible for AFDC because of the change in the "$30 and 1/3" disregard, your Notice of Decision will contain Reason A listed in Section 8 of this Explanation document.

Section 1

Gross Income Test

Effective January 1, 1982, under Section 69.19(4)(es), Wis. Statutes, you are no longer eligible for AFDC if your family's gross monthly income (total monthly income prior to any deductions) exceeds 150% of the AFDC need standard for your size family. The AFDC need standard used in determining your AFDC eligibility is found in Section 49.19(11)(a),Wis. Statutes. When looking at your gross income, we will not count Supplemental Security Income Program (SSI) payments, payments made under the low income Energy Assistance Program, Food Stamps and other

benefits when federal law says that the benefit may not be counted as income for a welfare program.

This table shows the maximum gross monthly income limits for different family sizes according to the area of the state in which you live.

MAXIMUM MONTHLY GROSS INCOME LIMIT BY FAMILY SIZE AND AREA

Family Size	1	2	3	4	5	6
Area I	$399	708	834	993	1,142	1,233
Area II	$387	687	809	963	1,107	1,196

Family Size	7	8	9	10
Area I	$1,337	1,418	1,485	1,520
Area II	1,296	1,376	1,440	1,475

If your case is closed because gross monthly income exceeds the new applicable limit explained above, your Notice of Decision will contain Reason A or C as

shown in Section 8 of this Explanation document.

Section 2

$75 Earned Income Disregard

Effective January 1, 1982, under Section 49.19(5)(a)2, Wis. Statutes, there is now a limit to the amount of your earned income which may be disregarded (not counted) as work related expenses. If you work full-time (30 hours or more per week), the earned income exemption will be $75. If you work less than full-time (less than 30 hours per week), the earned income exemption will be 18% of your gross income OR $75, whichever is less.

If your earned income disregard was more than $75 last month or more than 18% of income if you worked less than 30 hours, it will be reduced. This reduction may

cause your AFDC grant to be less or you may not be eligible for AFDC.

If your AFDC grant is reduced because of the $75 limit on the earned income disregard, your Notice of Decision will contain Reason D listed in Section 8 of this Explanation document. If you are ineligible for AFDC because of this change, your Notice of Decision will contain Reason A listed in Section 8 of this Explanation document.

Section 5

Asset Limit

Effective January 1, 1982, under Sections 49.19(4)(bm), 49.46(1)(a)1., and 49.46(1)(e), Wis. Statutes, and 42 CFR 435.700 and 435.711, the value of assets you may have is limited to $1,000. This limit is the same for AFDC and Medical

Assistance recipients who receive AFDC. The asset limit was formerly $1,500.

What we consider as an asset is the same under both the old and new law, except for motor vehicles. Section 49.19(4)(bm), Wis. Statutes, allows you to own any number of motor vehicles. Equity value is the money you would get (after paying what you owe on the vehicle) if you sold the vehicle for what it is worth in the current market. The vehicle which has the greatest equity value will be considered your "first vehicle." The equity value in the "first vehicle" in excess of $1,500 is counted toward the $1,000 asset limit. All equity in other vehicles is counted as an asset. Your case aide can tell you what the equity value of your motor vehicle is.

If your case is closed because your assets exceed the $1,000 limit, your Notice of Decision will contain Reason E listed in Section 8 of this Explanation document.

Section 6

Aid for Pregnant Women

Effective January 1, 1982, under Section 49.19(4)(g), Wis. Statutes, pregnant women who meet other AFDC eligibility criteria may be eligible for AFDC beginning in the seventh month of pregnancy. If found eligible for AFDC, pregnant women with no other children would receive a single person grant. No AFDC benefits can be paid to meet the needs of unborn children. The statute provides for payment of an additional $60 monthly allowance to pregnant women beginning in the seventh month of pregnancy and

continuing through the month of the child's birth.

If you have no children and you are married, and your spouse has been receiving AFDC, then he will no longer be eligible for AFDC because there is not a dependent child in your home. If your AFDC grant is reduced for this reason, your Notice of Decision will contain Reason F listed in Section 8 of this Explanation document.

You may be in the 7th, 8th or 9th month of pregnancy and be receiving an AFDC payment for the next size larger AFDC group than the actual size of your family. If so, your new AFDC payment will be changed to the AFDC payment for your actual family size not counting the unborn child, plus $60.

If your AFDC grant is reduced for this reason, your Notice of Decision will contain Reason J or L listed in Section 8 of this Explanation document.

Effective January 1, 1982, if you are pregnant you may be found ineligible for AFDC, (under Section 49.19(4)(g) Wis. Statute) or Medical Assistance (under Sections 49.46(1)(a)1., or 49.47(4), Wis. Statutes) for one of the following reasons:

1. You are in the first six months of pregnancy. If you are ineligible for AFDC for this reason, your Notice of Decision will contain Reason I listed in Section 8 of this Explanation document.

2. You are married and do not meet the AFDC eligibility criteria for the

Unemployed Parents Program or either you or your spouse is not incapacitated. If you are ineligible for Medical Assistance for this reason, your Notice of Decision will contain Reason M or N listed in Section 8 of this Explanation document.

3. If you are the father of an unborn child, you will no longer be eligible for Medical Assistance. Your Notice of Decision will contain Reason M listed in Section 8 of this Explanation document.

Section 7

Some 18-21 Year Olds Are No Longer Eligible for Medical Assistance

Effective January 1, 1982, under Section 49.47(4)(a)1. and 2., Wis. Statutes, and 42 CFR 435.308, you may no longer be eligible for Medical Assistance.

Formerly, you were eligible for Medical Assistance if your income was low enough and you were between 18 and 21 years of age. Now, even though your income is low enough, you are no longer automatically eligible for Medical Assistance simply because you are between 18-21 years of age. To maintain your Medical Assistance eligibility, you will have to meet the income and asset limitations and be one of the following:

a. Blind

b. Disabled

c. Pregnant and otherwise eligible for AFDC, but have not reached the 7th month of your pregnancy.

d. Included in an AFDC grant.

Section 8

DESCRIPTION OF "REASONS" CONTAINED IN YOUR NOTICE OF DECISION LETTER.

This Section lists the brief "reason" statement(s) that are contained in Notice

of Decision letters for a reduction in benefits or a finding of ineligibility. Refer to Sections 1-7 of this Explanation of Program Changes document for a fuller explanation of each change.

A. Income is $_____ above limit allowable for eligibility. 49.19(5)(a)* Stats, 45 CFR** 233.20(a)(3)

B. Income is $_____ above limit allowable for eligibility. 49.46(1)(a)* or 49.47(4)(c) Stats., 42 CFR 435.700 and 435.711

C. Income exceeds the gross income limit. 49.19(4)(es)*, Stats., 45 CFR 233.20(a)(3)(xiii)

D. Allowable work related expenses are less. 49.19(5)(a)2.,* Stats., 45 CFR 233.20(a)(ii)

E. Assets are $_____ above limit allowable limit. 49.19(4)(bm)*; 49.46(1)(a)1., Stats.; 45 CFR 233.20(a)(3)

F. There is no eligible child (under 18) in the home. 49.19(1)(a), Stats.

G. Child care costs are less/unneeded. 49.19(5)(a)3.*, Stats.; 45 CFR 233.20(a)(ii)

H. Allowable earned income disregard is less. 49.19(5)(a)4.*, Stats.; 45 CFR 233.20(a)(ii)

I. Pregnancy is not in month 7, 8 or 9. 49.19(4)(g)*; 49.47(4)(a)2.*; 49.46(1)(a)1m*, Stats.

J. Pregnancy allowance has been reduced. Sec. 49.19(4)(g)*, Stats.

K. He/she is 18-21 years old. 49.47(4)*, Stats.

L. The pregnancy allowance no longer applies. Sec. 49.19(4)(g)*, Stats.

M. Is not aged, blind, disabled or under 18. 49.47(4)(a), Stats.

N. No person is determined eligible. 49.19(4)(a), 49.47(4)(a), Stats.

O. A resident in a intermediate care facility, skilled nursing facility or inpatient psychiatric hospital, and under 21 years of age.

---

*Wisconsin statutes effective January 1, 1982
**Code of Federal Regulations

If you are no longer eligible for medical assistance because you are 18-21 years of age and are not covered by a-e. above, your Notice of Decision will contain Reason K listed in Section 8 of this Explanation document.

EXPLANATION OF PROGRAM CHANGES.

Please read this sheet carefully, together with your notice of decision letter.

Section 9

RIGHTS TO APPEAL

You have the right to appeal any action taken by this agency. You may appeal in writing, by phone or in person. To appeal by phone or in person, call the number or go to the office shown on your

Notice of Decision letter. Oral hearing requests must be followed by a written request before a hearing will be scheduled. To submit a written request for a fair hearing, send your request to your local agency or to the State Department of Health and Social Services, Office of Administrative Hearings, c/o Division of Economic Assistance, P. O. Box 8913, Madison, WI 53708. You must do this within 45 days of January 1, 1982.

You have the right to a written notice from this agency 10 days in advance of any action we intend to take that will stop or reduce your benefits. If you request a fair hearing during those 10 days, your benefits will not be stopped or reduced at least until the fair hearing decision is made. If the hearing decision orders that your aid be reduced or stopped, you may be required to repay

any excess benefits you received while your appeal was pending. We will be glad to explain how this might apply to your case. Our staff will help you with any request for a fair hearing, or will arrange a conference with you to discuss any agency actions you question. A conference will not affect your right to a fair hearing.

If you or your representative fail to appear, without good cause, at your scheduled hearing, your appeal will be considered abandoned and will be dismissed.

At any fair hearing or conference you may represent yourself or be represented by an attorney, friend, relative or other person of your choice. We cannot pay for an attorney for you, but free legal advice may be available to you. You may

call the phone number on the Notice of Decision letter for more information about this. You can also retain a private attorney at your expense. You may contact the legal referral service in your community if you do not already have an attorney.

If you have trouble understanding or speaking English, you may bring your own interpreter. We cannot pay for this, but free help may be available. You may call the phone number on the Notice of Decision letter for more information.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

vs. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

MEMORANDUM AND ORDER

On January 14, 1982, the Court issued a preliminary injunction in this action requiring defendants to reinstate, to their December 1981 level, the Aid to Families with Dependent Children ("AFDC") benefits and Medical Assistance ("MA") benefits to those class members of the plaintiff class whose aid was reduced or terminated as a result of seven changes made by the State of Wisconsin in the method used for determining the eligibility for those benefits. These

changes came about as a result of the Omnibus Budget Reconciliation Act ("OBRA") enacted by Congress in August of 1981. The Court ordered the injunction to remain in effect until defendants provided plaintiff class members with adequate notice of the reasons for the proposed reduction or termination of their benefits.

On January 20, 1982, the Court approved notices submitted by the defendants. Defendant mailed the approved notices directly to class members affected by six of the seven OBRA changes. The parties agree that the notices sent to these individuals provided them adequate advance notice of the reasons for the proposed reduction or termination of their benefits.

Due to a programming error, defendants mailed the notice pertaining

to the application of the OBRA 150 percent gross income test to county agency offices rather than directly to those class members affected by the 150 percent gross income test. After discovering the error, defendants directed the county agencies to forward the notices to the individuals affected by the change.

At the hearing held on January 20, 1982, defendants' counsel inquired whether the Court's January 14, 1982 order required the State to reinstate the benefits of plaintiff class members for the month of January. Defendants contended for the first time at that hearing that such an order would violate the Eleventh Amendment. Because the parties had not addressed this issue previously, the Court treated defendants' inquiry and contention as a request for

clarification and ordered the parties to brief the issue. That issue has now been fully briefed and will be resolved in this memorandum and order.

In addition, the Court will resolve at this time defendants' motion to dismiss and defendants' motion to modify the January 14, 1982 injunction.

I. Motion to Dismiss

Defendants' motion to dismiss is based on their contention that this Court is without jurisdiction in this action. Specifically, defendants contend plaintiffs lack the requisite standing to fulfill the "case or controversy" requirement of Article III of the United States Constitution.

When a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of

the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). The individual plaintiffs, on behalf of themselves and the plaintiff class designated by the Court, clearly have met this requirement. They allege they have been injured as a result of defendants' failure to provide them with adequate notice of the reasons for terminating or reducing their benefits. This type of injury can be and, in fact, has been redressed by courts in the Seventh Circuit. See Dilda v. Quern, 612 F.2d 1055 (7th Cir.) cert. denied, 447 U.S. 935 (1980); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Vargas v. Trainor, 508

F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975).

Plaintiffs contend the two welfare rights groups have standing because they are "in the business" of advising and representing public assistance applicants and recipients. Plaintiffs further contend the organization plaintiffs have been impeded in fulfilling their function as a result of the inadequate notice provided by defendants. Plaintiffs also argue that Dane County Welfare Rights Alliance has standing because it is suing on behalf of its members.

In Valley Forge Christian College v. American United for Separation of Church and State, ____ U.S. ____, 50 U.S.L.W. 4103 (January 12, 1982), an organization dedicated to the separation of church and state challenged the

transfer of government property at a discounted rate to a church-related college. In its decision, the Supreme Court undertook a review of its earlier decisions on the issue of standing. The Court stated:

> The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. SCRAP, 412 U.S. 669, 687 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of juris-prudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in Sierra Club v. Morton, 405 U.S. 727, 740 (1972):

> "The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." Id. at 4105.

Having considered plaintiffs' arguments in light of the Valley Forge decision, the Court concludes that the organization plaintiffs fall into the category of concerned bystanders. Although the members of the organizations have been affected by the defendants' actions, the organizations themselves do not have a direct stake in the outcome of this litigation.

Based on the foregoing, the Court grants defendants' motion to dismiss the claims of plaintiffs Dane

County Welfare Rights Alliance and Community Advocates and denies defendants' motion to dismiss the claims of the four individuals and class members.

II. Eleventh Amendment Issue

In its January 14, 1982 order, the Court required defendants "to reinstate to their original level the AFDC, MA and FS benefits to those members of the plaintiff class whose aid was reduced or terminated as a result of one of seven specified OBRA provisions." The question the Court must now determine is whether the defendants were obligated to pay January benefits at the December 1981 level, or whether an order to that effect would constitute retroactive relief against the State of Wisconsin in violation of the Eleventh Amendment.

Plaintiffs contend payment of January benefits at their previous level would not violate the Eleventh Amendment. In support of their position, they rely primarily on Turner v. Walsh, 435 F. Supp. 707, aff'd, 574 F.2d 456 (8th Cir. 1978); and Porter v. Schweiker, Civil Case No. 4-81-651 (D. Minn. Oct. 29, 1981).

In Turner, the Eighth Circuit Court of Appeals adopted the decision of the district court and affirmed its ruling that a state's failure to provide adequate written notice of planned AFDC reductions required reinstatment of plaintiffs' benefits for July, the month in which the order was made. In ordering defendants to make the July payments at June levels, the district court stated:

> Although the effective date of implementation of §208.150, R.D.Mo. 1977 [the new computation method] was July 1, 1977,

> and the members of plaintiffs' class may have been physically removed from the computer rolls with respect to their June benefits, the evidence indicates that welfare benefits are payable any time within the month; thus, if ordered to do so within the month of July, defendants' action to restore benefits to their June levels would constitute a continuation of those benefits, rather than a retroactive grant. See Edelman v. Jordan, 415 U.S. 651 (1974); Milliken v. Bradley, 443 U.S. 267 (1977). Id. at 714-715, footnote 9.

A federal district court in Minnesota reached a similar result in Porter. In that action, plaintiffs brought suit to challenge the October 1, 1981 reductions in plaintiffs' AFDC grant for a recoupment procedure the State of Minnesota claimed was mandated by OBRA provisions. On October 29, 1981, the Court ruled in favor of the plaintiffs and ordered the State to reinstate plaintiffs' AFDC benefits for October 1981 at their September 1981 levels. In

addressing the question whether its order violated the Eleventh Amendment, the court stated:

> this case, at this stage of the proceedings does not fall within the prohibitive confines of the Eleventh Amendment. October AFDC grants are supposed to meet the needs of the recipient's family which arise in October. Although AFDC grants are generally paid on the first of the month, they may be paid or supplemented at any time during the month. Thus, an order requiring reinstatement of October benefits to be completed in October does not provide retroactive relief from the State's Treasury contrary to Quern, Edelman, and the Eleventh Amendment. See Turner v. Walsh, 435 F. Supp. 707, 714 fn. 9 (W.D. Mo. 1977), aff'd 574 F.2d. 456 (8th Cir. 1978). Such a reinstatement is merely a continuance of benefits and has no retroactive effect. 435 F. Supp. at 715.

Defendants contend Turner is distinguishable from the case at bar because Turner involved inadequate information regarding hearing rights

rather than inadequate notice. They also contend the Turner analysis may be questionable because that decision was decided prior to Quern v. Jordan, 440 U.S. 332 (1979).

Defendants also contend Porter offers little guidance to the Court because it was not a notice case but rather dealt with grants which were proven incorrect. Defendants further contend Porter should not be followed because the defendants in that action appealed the district court's decision.

The Court finds defendants' attempts to distinguish Turner and Porter unpersuasive. That the underlying violations in those cases were not precisely the same as the violation in this action does not affect their relevance. Whether notices to public assistance recipients are inadequate

because the reasons given are incomplete or because the explanation of appeal rights is inaccurate does not affect the ultimate conclusion that notice is invalid if it is inadequate. Furthermore, that Turner was decided prior to Quern does not affect its relevance since it is the Supreme Court's decision in Edelman which differentiates prospective from retroactive relief. Finally, because the defendants in Porter have abandoned their appeal, defendants' contention that the appeal in that action affects its viability is without merit.

This Court agrees with the Turner and Porter courts that an interpretation of the January 14, 1982 order requiring continuation of January benefits at December levels would not constitute a retroactive grant, to the extent state law permits payment of

benefits at any time during a month. Therefore, the Court must look to Wisconsin law to determine whether AFDC and MA payments can be made at any time during a month or whether they must be made prior to the fourteenth of the month, i.e., the date of this Court's original order.

Under Wisconsin law, AFDC payments are to be made monthly, except that the director of the county agency may, in his discretion for the purpose of protecting the public, direct that the monthly allowance be made in two or more installments. Wis. Stat. § 49.19(3)(b). Section PW-PA 20.11(3) of the Wisconsin Administrative Code sets forth the manner by which payments under the lump sum and installment plans are to be made. That section also provides that supplemental payments to meet increased

budgetary needs and payments correcting prior underpayments may be made at any time during a month. In addition, under section PW-PA 20(11)(4), adjustments made after grants of aid are reinstated after suspension, adjustments upon order of the state department of health and social services, division of family services, made in accordance with Wis. Stat. § 49.50(8), and adjustments engendered by courts' decisions which change the regulation upon which the case was denied, discontinued or improperly computed are not precluded.

Although neither the Wisconsin Statutes nor the Administrative Code provisions specifically state that a judicially ordered adjustment to benefits in an action such as this constitutes a continuation of benefits rather than a retroactive grant, the fact that the

Wisconsin legislature permits payments throughout a month for legitimate reasons such as underpayments and miscalculated payments leads this Court to conclude that an order requiring continuation of benefits for the month of January would constitute a continuation of benefits rather than a retroactive grant in violation of the Eleventh Amendment. Therefore, pursuant to the Court's memorandum and order of January 14, 1982, defendants must pay January 1982 AFDC benefits to the eligible class plaintiffs at their December 1981 level.

In Wisconsin, MA benefits are not paid directly to the aid recipients. Rather, the recipients are issued Medicaid cards which they present to certified providers of health care services. The payments are later made by the State directly to the providers.

In December of 1981, the computer center which handles the mailing of Medicaid cards to medical assistance recipients did not mail Medicaid cards for January 1982 to 37,844 Medicaid recipients whose aid was to be terminated as a result of the OBRA changes. Because none of these individuals had Medicaid cards, none of them could "bill" the State for medical services rendered in the month of January.

Plaintiffs contend that an order requiring reinstatement of all medical assistance benefits for the month of January 1982 would not violate the Eleventh Amendment because Wis. Stat. § 49.46(1)(b) states that a person shall be considered a recipient of aid for three months prior to the month of application if the proper agency determines eligibility existed during such prior

month. Further, plaintiffs contend, an order requiring payment for all services rendered during the month of January would not be retroactive because, under Section HSS 106.03 of the Wisconsin Administrative Code, a claim may be submitted to the fiscal agent within one year of the date the medical service was provided.

The Court cannot accept plaintiffs' argument that all January medical bills should be paid by the State. The State's obligation to pay for medical services arose at the time the treatments were received. To require the State to make payments for services rendered prior to January 14, 1982 would be tantamount to "'the award of an accrued monetary liability . . .' which represent[s] 'retroactive payments.'" Milliken v. Bradley, 433 U.S. at 289

(quoting from Edelman v. Jordan, 415 U.S. at 663-64).

The Court does, however, agree with plaintiffs that an order requiring the State to pay for medical services received after January 14, 1982 would not violate the Eleventh Amendment. Such relief could hardly constitute "the award of an accrued monetary damage." To the contrary, the State's liability for those services did not become fixed until after the entry of the Court's January 14, 1982 memorandum and order. See, Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979). Accordingly, pursuant to the Court's order of January 14, 1982, the State is liable for January medical services obtained by eligible plaintiff class members after January 14, 1982.

III. Motion to Modify Injunction

As stated earlier, a programing error resulted in the notice approved by the Court on January 20, 1982 being mailed to the county agency offices, rather than directly to the plaintiffs affected by the 150 percent gross income test.

The State recognizes that its failure to mail these notices directly to the eligible plaintiffs constituted untimely notice. However, because it acted in good faith in attempting to provide adequate and timely notice, the State requests the Court to modify the injunction with respect to the affected plaintiffs by relieving it from reinstating benefits for February 1982. The State suggests that an appropriate alternative remedy would be an order requiring it to send the affected

plaintiffs a notice extending their hearing rights.

Although the Court is sympathetic to the State's plight, it is of the opinion that the requested relief would be contrary to the law. Federal regulations provide that notice must be mailed ten days prior to the effective date. 45 CFR § 205.10(a)(4)(i)(A). Defendants failed to comply with this regulation.

Based on the foregoing, defendants' motion for a modification of the injunction is hereby DENIED.

IV. Summary

In summary,

(1) defendants' motion to dismiss the claims of the two organizational plaintiffs is GRANTED;

(2) defendants' motion to dismiss the claim of the individual class members is DENIED;

(3) pursuant to the Court's order of January 14, 1982, defendants must pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits;

(4) pursuant to the Court's order of January 14, 1982, defendants must pay for the medical services received by eligible plaintiffs after January 14, 1982; and

(5) defendants' motion for modification of the January 14, 1982 injunction is DENIED.

SO ORDERED this 1st day of June 1982, at Milwaukee, Wisconsin.

/s/ ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

vs. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

DECISION AND ORDER

On January 14, 1982, the Court issued a preliminary injunction in this action requiring defendants to reinstate to their December 1981 level, the Aid to Families with Dependent Children (AFDC) benefits and Medical Assistance (MA) benefits to those class members of the plaintiff class whose aid was reduced or terminated as a result of seven changes made by the State of Wisconsin in the method used for determining eligibility

for those benefits. Those changes came about as a result of the Omnibus Budget Reconciliation Act (OBRA) which Congress enacted in August 1981. The Court ordered the injunction to remain in effect until defendants provided plaintiff class members with adequate notice of the reasons for the proposed reduction or termination of their benefits.

On January 20, 1982, the Court approved notices prepared by the defendants. Defendants mailed the approved notices directly to class members affected by six of the seven OBRA changes. The parties agree that the notices sent to these individuals provided them adequate notice of the reasons for the proposed reduction of termination of their benefits.

Due to a programming error, however, defendants mailed the notice pertaining to the application of the OBRA 150 percent gross income test to county agency officers rather than directly to those class members affected by the 150 percent gross income test. After discovering the error, defendants directed the county agencies to forward the notices to the individuals affected by the changes. By motion, filed February 3, 1982, defendants requested the Court to modify its order of January 14, 1982 with regard to the plaintiff class members affected by the 150 percent gross income test. Defendants requested that they be relieved from reinstating AFDC and/or MA benefits to such persons for February 1982 since defendants had acted in good

faith in attempting to provide adequate and timely notice.

Defendants also requested the Court for clarification of its January 14, 1982 order in regard to the Court's directive to reinstate benefits at original levels. The question presented to the Court was whether the defendants were obligated to pay January 1982 benefits at the December 1981 level, and whether an order to that effect would constitute relief against the State of Wisconsin in violation of the Eleventh Amendment.

In its order of June 1, 1982, the Court resolved the foregoing questions. It held that defendants were required by the Janaury 14, 1982 order to pay eligible plaintiffs AFDC benefits for January 1982 at December 1981 levels and to pay for medical services received by eligible plaintiffs after January 14,

1982. The Court held that the order did not constitute a violation of the Eleventh Amendment. In addition, the Court denied defendants' motion to modify the January 14, 1982 order and held that defendants' failure to provide timely notice to the plaintiff class members affected by the 150 percent gross income test, albeit in good faith, constituted a violation of the notice requirement contained in applicable federal regulations.

On July 1, 1982, defendants filed a notice of appeal with regard to that portion of the Court's June 1, 1982 order which required defendants to pay eligible plaintiffs AFDC benefits for January 1982 at December 1981 levels and to pay for medical services received by eligible plaintiffs after January 14, 1982. Defendants did not appeal that portion of

the Court's June 1 order denying defendants' motion to modify.

On July 13, 1982, defendants filed a motion for stay and motion for stay pending appeal. Defendants request (1) a stay of all orders prohibiting defendants from reducing AFDC and MA payments and (2) a stay pending appeal of the Court's order clarifying the January 14, 1982 order. The grounds for the motion to stay are: (1) that defendants cannot assure the restoration of MA benefits in the form of the actual receipt of a check by each eligible class member until six months to a year have elapsed; and (2) that the issuance of AFDC benefits would interfere with complicated computer conversions now mandated by changes in federal law. As grounds for their motion for a stay pending appeal, defendants assert: (1) that a stay would be in the

public interest; (2) that the state would suffer irreparable financial harm in the absence of a stay and in the event of reversal on appeal; and (3) that the potential harm to plaintiffs caused by a stay would be minimized because the state retains the ability to locate eligible plaintiffs in the event an appeal is unsuccessful. The Court will discuss and resolve these motions separately below.

I. Motion for Stay Pending Appeal

Rule 62(c) of the Federal Rules of Civil Procedure provides that an interlocutory or final judgment in an action for an injunction shall not be stayed pending appeal unless the district court, in its discretion, orders such a stay. The district court should consider four factors in determining whether a stay should be granted:

(1) the likelihood of the appellant's success on the merits of its appeal;

(2) the chance that the appellant will suffer irreparable harm unless the stay is granted;

(3) the degree of harm the appellees will suffer if the stay is granted; and

(4) whether a stay is compatible with the public interest.

Jordan v. Wolke, 463 F. Supp. 641, 642 (E.D. Wis. 1978).

The Court considers these factors below.

A. Appellants' Likelihood of Success on Appeal.

In considering the defendants' likelihood of prevailing on an appeal of the Court's order of June 1, 1982, the Court must consider separately the two aspects of the order which defendants have appealed. One part of the Court's order requires the payment of AFDC benefits for January 1982 at December

1981 benefits. The other part requires payment for medical services received by eligible plaintiffs after January 14, 1982.

With respect to AFDC benefits, the Court concludes that defendants have a reasonable chance of prevailing on appeal. In its order of June 1, 1982, the Court considered whether under Wisconsin law, AFDC payments may be supplemented after initial payments have been made. See Mem. & Order at 7, 8. The Court concluded that, although the Wisconsin Statutes and Administrative Code were silent with regard to adjustment of benefits pursuant to court order, the applicable legislation could be interpreted as allowing for such adjustments. Having so concluded, the Court held that its order of January 14, 1982 required the payment of January 1982

AFDC benefits at December 1981 levels and did not violate the Eleventh Amendment. Mem. & Order at 8. While this Court would still maintain that this conclusion is supported by the applicable Wisconsin legislation and by federal case-law authority, see, e.g., Turner v. Walsh, 435 F. Supp. 707, aff'd, 574 F.2d 456 (8th Cir. 1978), and Porter v. Schweiker, Civil Case No. 4-81-651 (D. Minn. Oct. 29, 1981), it would also opine that there is room for disagreement. What constitutes retroactive relief against a state in violation of the Eleventh Amendment is often a difficult question to resolve. In the context of the instant case, it is one as to which the Seventh Circuit may reach a different answer. Accordingly, the Court concludes that, with respect to that portion of its June 1, 1982 order concerning the payment

of January 1982 AFDC benefits at December 1981 levels, the defendants have a reasonable chance of prevailing on appeal.

The Court takes a different view, however, with regard to that portion of its June 1 order regarding the state's obligation to pay for medical services received by eligible plaintiffs after January 14, 1982. In its order of June 1, 1982, the Court rejected the plaintiffs' argument that all January medical bills should be paid by the State. See Mem. & Order at 9, 10. It concluded that, under the applicable state law, the defendants' obligation to pay for medical services arose at the time the treatments were received. Thus, to require the state to make payments for services rendered prior to January 14, 1982 would be tantamount to "'the award

of an accrued monetary liability ...' which represent[s] 'retroactive payments.'" Milliken v. Bradley, 433 U.S. at 289 (quoting Edelman v. Jordan, 415 U.S. at 663-64). Nonetheless, the Court concluded that its order of January 14, 1982 requires payment for medical services received by eligible plaintiffs after January 14, 1982. The Court reasoned that such relief could hardly be considered an "award of an accrued monetary liability" since the State's liability for those services did not become fixed until after the entry of the Court's order of January 14, 1982. See June 1, 1982 Mem. & Order at 9.

In light of the foregoing reasoning, the Court has little difficulty in concluding that defendants have little likelihood of prevailing on appeal with regard to that portion of the June 1

order which addresses the State's liability to pay for medical services rendered after January 14, 1982. The prospective nature of the relief ordered by the Court in its January 14, 1982 order leaves little room for challenge on Eleventh Amendment grounds.

Moreover, the Court is equally convinced that defendants have little chance of prevailing on appeal with regard to the initial issue presented in this case, i.e., the sufficiency of the original notices sent to benefit recipients. The Court went into great detail in its January 14, 1982 memorandum and order setting forth the deficiencies in the challenged notices. Applying the relevant precedents from the Seventh Circuit, the Court concluded that plaintiffs had demonstrated a reasonable likelihood of success on the merits of

their due process challenge with respect to various portions of the notices. The Court also concluded that plaintiffs had carried their burden with respect to the other prerequisites necessary for the issuance of a preliminary injunction. The Court has little doubt that its decision will be upheld on appeal, particularly in light of the Seventh Circuit's prior rulings in similar cases. See Dilda v. Quern, 612 F.2d 1055 (7th Cir.), cert. denied, 447 U.S. 935 (1980); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974) cert. denied, 420 U.S. 1008 (1975).

B. Potential Harm to Appellants in the Absence of a Stay.

Defendants have detailed in affidavits the potential financial harm the State of Wisconsin would suffer if a stay is not granted and this Court's decision is reversed on appeal. Defendants are primarily concerned about the unrecoverable costs of complying with this Court's order and with the potential unrecoverable benefits which must be paid pursuant to the Court's order.

Defendants estimate that the Court's clarification order requires the State to pay out over $2,250,000.00 in AFDC benefits. (AFDC & Cost Aff. ¶'s 13-15). In the event of a successful appeal, unrecoverable AFDC benefits and associated collection costs would be approximately $675,000.00. In addition, there would be certain administrative

costs of compliance with this Court's order which would be unrecoverable. Although plaintiffs have pointed out that there is authority under Wisconsin law for the recovery of incorrectly-paid AFDC benefits (see Plaintiff's Brief at 10), the Court does not doubt, in light of the nature of the AFDC program, that substantial amounts of benefits and costs would be unrecoverable.

Defendants estimate that $175,000 in MA benefits must be paid as a result of this Court's clarification order. (MA Aff. ¶'s 9, 14, 15). Total administrative costs of paying such benefits are estimated to be $25,000. (MA Aff. ¶'s 11-13, 28). Plaintiffs concede that there is no recovery mechanism under Wisconsin law for incorrectly-paid MA benefits. See Plaintiffs' Brief at 10. Thus, the total unrecoverable MA payments

and reimbursement costs would be approximately $200,000. Defendants estimate that the procedure for reimbursement of MA benefits will take approximately six months. (MA Aff. ¶ 6.)

C. Potential Harm to Appellees if a Stay is Granted.

As defendants have conceded in their initial brief (p. 6), the Seventh Circuit has indicated that the reduction of welfare benefits can constitute irreparable harm for purposes of injunctive relief. See Banks v. Trainor, 525 F.2d 837, 843 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976). In the present context, however, the Court must consider the harm to plaintiffs in comparison to that which might be suffered by defendants in the absence of a stay. See Shinholt v. Angle, 90 F.2d

297, 298 (5th Cir. 1937). In the instant case, it is evident that both sides will suffer injury if the other side prevails.

D. The Public Interest.

In arguing that the request for a stay should be denied, plaintiffs point to this Court's order of January 14, 1982 in which it stated that "all citizens benefit when the Constitution is upheld." 533 F. Supp. at 840. As defendants point out in their reply brief, however, granting a stay cannot be equated with denying plaintiffs their constitutional rights. At this stage in the proceedings, the Court is concerned with the public interest as it relates to whether the Court's order should be stayed pending appeal. In examining this issue, the Court must also consider the potential harm to the taxpayers of

Wisconsin in the event defendants are successful on appeal. The Court concludes that there is a strong public interest to be served on each side of the case.

E. Weighing the Factors.

Having considered the four factors noted by the court in Jordan v. Wolke, 463 F. Supp. at 642, the Court must now weigh those factors in deciding whether to stay its order pending appeal. As indicated above, there are substantial harms which could be suffered by either side depending on the outcome of defendants' appeal. Moreover, there is a strong public interest favoring each side. The Court concludes, therefore, that it must look to the first factor, i.e., the reasonable likelihood of success on appeal, to resolve the motion

for a stay pending appeal. As the Court concluded above, defendants do not have a reasonable chance of succeeding on appeal of this Court's order as it relates to the payment of MA benefits. Consequently, the Court will deny defendants' motion to stay that portion of the Court's order. Conversely, because the Court has concluded above that defendants have a reasonable chance of succeeding on appeal with respect to the payment of AFDC benefits, the Court will stay the portion of its order relating to AFDC benefits.

II. Motion for Stay.

In addition to requesting a stay pending appeal, defendants request the Court to exercise its inherent power to stay all other supplemental benefit payments required by the Court's

preliminary injunction. Those "other supplemental benefit payments" include the amounts which must be paid to those class members affected by the 150 percent gross income test who did not receive timely notice with regard to the change in benefits for February 1982. These amounts must be paid by virtue of the Court's denial of defendants' motion for modification. See Mem. & Order of June 1, 1982 at 10. While defendants concede that there were no valid grounds upon which to appeal the denial of the motion for modification (see Defendants' Reply Brief at 6), they contend that there is a basis for challenge to this Court's original decision concerning the adequacy of the underlying notices. They maintain that the Seventh Circuit is empowered to examine the validity of the underlying notices which prompted this

Court to issue its preliminary injunction on January 14, 1982. Thus, defendants ask the Court to stay all supplemental benefit payments pending the outcome of the appeal. In addition, defendants contend that there would be certain administrative conveniences in staying the supplemental benefit payments until after their appeal is resolved.

The Court cannot accept defendants' arguments. First, as indicated previously in this decision and order, the Court believes that defendants' chances of succeeding on a challenge to this Court's original order finding the challenged notices insufficient are slim at best. Second, other than citing the All Writs Statute (which has nothing to do with this case) and two inapposite Supreme Court decisions, defendants have cited no legal authority to support their

request for a stay. Finally, defendants' assertion that there would be certain administrative burdens avoided by awaiting the Seventh Circuit's resolution of this case do not provide adequate justification for a stay. For these reasons, the Court will deny defendants' request for a stay.

SUMMARY

In summary:

1. The motion to stay this Court's order of June 1, 1982 requiring defendants to pay eligible plaintiffs AFDC benefits for January 1982 at December 1981 benefits is hereby GRANTED. Defendants shall, during the pendency of the appeal, maintain the capability to pay the described benefits should their appeal prove unsuccessful;

2. The motion to stay that portion of the June 1, 1982 order requiring defendants to pay for medical services received by eligible plaintiffs after January 14, 1982 is hereby DENIED; and

3. Defendants' motion to stay all other supplemental payments required by this Court's preliminary injunction is hereby DENIED.

SO ORDERED this 21st day of September 1982, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

APPENDIX E

United States Court of Appeals 11

For the Seventh Circuit

Chicago, Illinois 60604

October 28, 1982

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

GERALDINE BUCKHANON, and ROSETTA BAILEY, et al., Plaintiffs-Appellees, Cross-Appellants.	) Appeals from) the United) States Dist-) rict Court) for the
Nos. 82-2057 and 82-2142 vs.	) Eastern Dist-) rict of) Wisconsin.
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants, Cross-Appellees.	)) No. 81 C 1601) Judge) Robert W.) Warren)

This matter comes before the court for its consideration upon the following documents:

1. "MOTION FOR STAY PENDING APPEAL" filed herein on October 13, 1982, by counsel for the defendants-appellants, cross-appellees.

2. "BRIEF OF APPELLANTS AND CROSS-APPELLEES IN SUPPORT OF MOTION FOR STAY PENDING APPEAL" filed herein on October 14, 1982, by counsel for the defendants-appellants, cross-appellees.

3. "BRIEF OF APPELLEES AND CROSS APPELLANTS IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL" filed herein on October 22, 1982, by counsel for plaintiffs-appellees, cross-appellants.

In light of the fact that the payments required may very well not be recoverable should defendants-appellants, cross-appellees prevail on appeal and in order to accord the State the right to a meaningful appeal,

IT IS ORDERED that the motion seeking a stay of the district court's injunction requiring that MA payments

between January 15, and January 31, 1982 be made at December 1981 MA benefit levels, and of the district court's injunction requiring February AFDC and MA payments to those individuals who did not satisfy the 150% gross income test to be made at December 1981 benefit levels, be GRANTED.

APPENDIX F

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 21, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. _____
Hon. _____

GERALDINE BUCKHANON, and ROSETTA BAILEY, et al., Plaintiffs-Appellees and Cross-Appellants,	Appeals from the United States District Court for the Eastern District of Wisconsin.
No. 82-2057 and No. 82-2142 vs.	No. 81 C 1601
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants and Cross-Appellees.	Judge Robert W. Warren

On consideration of the "MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND REHEARING, EN BANC, INSTANTER; FOR STAY OF THE ISSUANCE OF THE MANDATE PENDING DISPOSITION OF MOTION FOR LEAVE TO FILE SUCH PETITION AND/OR PENDING FILING OF

PETITION FOR WRIT OF CERTIORARI; MOTION TO REINSTATE STAY PENDING DISPOSITION OF MOTION FOR LEAVE TO FILE REHEARING PETITION, AND/OR PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI, AND/OR PENDING ENTRY OF FINAL JUDGMENT IN THE DISTRICT COURT" filed herein on June 9, 1983, by counsel for the defendants-appellants, cross-appellees,

IT IS ORDERED that said motion is hereby GRANTED. The Clerk of this Court shall file herein instanter the 25 tendered copies of defendants-appellants, cross-appellees' petition for rehearing and rehearing en banc.

APPENDIX G

Opinion by Judge Cudahy
JUDGMENT -- ORAL ARGUMENT

United States Court of Appeals 17

For the Seventh Circuit

Chicago, Illinos 60604

May 20, 1983.

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. CALE J. HOLDER, District Judge*

GERALDINE BUCKHANON, and ROSETTA BAILEY, et al., Plaintiffs-Appellees, Cross-Appellants,	)	Appeals from the United States District Court for the Eastern District of Wisconsin.
Nos. 82-2057 and 82-2142 vs.	)	
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants, Cross-Appellees.	)	No. 81-C-1601 Robert W. Warren, Judge

This cause was heard on the record from the United States District Court for

---

* The Honorable Cale J. Holder, District Judge for the Southern District of Indiana, is sitting by designation

the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED in part, AFFIRMED in part, and MODIFIED in part, and this Court's order of October 28, 1982, is VACATED, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

APPENDIX H

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 9, 1983

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. Cale J. Holder, District Judge*

GERALDINE BUCKHANON and ROSETTA BAILEY, et al., Plaintiff-Appellees and Cross-Appellants,	) Appeals from the United States District Court for the Eastern District of Wisconsin.
No.s. 82-2057 and 82-2142 vs.	) No. 81 C 1601 Robert W. Warren, Judge.
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants and Cross-Appellees.	

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the

*The Honorable Cale J. Holder, District Judge of the Southern District of Indiana, sitting by designation. Judge Holder died suddenly on August 23, 1983, but voted to deny the petition for rehearing on August 1.

above-entitled case, no active member of the court having requested a vote on the suggestion for an en banc rehearing, and the members of the panel having voted to deny said petition for rehearing,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
of Wisconsin

Attorneys for Petitioners

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Office - Supreme Court, U.S.
FILED
JAN 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AND APPENDIX

ANNE L. DE LEO
PATRICIA MC MAHON
Attorneys for Respondents

LEGAL ACTION OF WISCONSIN, INC.
230 West Wells Street Room 800
Milwaukee, Wisconsin 53203
(414) 278-7722

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

I. Where a district court issues a preliminary injunction order enjoining state officials from reducing or terminating public assistance benefits, does the Eleventh Amendment prohibit payment of the wrongfully reduced or terminated benefits for the period of time after the preliminary injunction order is entered?

II. Does the scope of review from a timely appeal of an order clarifying a preliminary injunction necessarily extend back to include the unappealed preliminary injunction order?

TABLE OF CONTENTS
AND
TABLE OF AUTHORITIES

Page

QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE.....7

SUMMARY OF ARGUMENT.....10

ARGUMENT.....11

I. The Decision Of The Seventh Circuit Does Not Violate The Eleventh Amendment.....11

A. The decision of the Seventh Circuit correctly interpreted the Eleventh Amendment and decisions of this Court in drawing the line between prospective and retroactive relief.....11

B. The decision of the Seventh Circuit is consistent with decisions in the other circuits and petitioners have shown no conflict among them.....14

C. Wisconsin law permits payment of AFDC and/or Medical Assistance benefits at any time during a calendar month and the award of benefits after January 14, 1982 is consistent with state law and the Eleventh Amendment.....17

Page

II. Appeals from Interlocutory Orders are Limited Grants of Jurisdiction And The Seventh Circuit Properly Limited Its Jurisdiction And The Scope Of Review.....23

A. The Seventh Circuit had no jurisdiction to review an order granting a preliminary injunction which was not appealed within the thirty-day time limit and which petitioners did not include in their notice of appeal, despite the opportunity to do so.....23

B. The Seventh Circuit's careful exercise of its discretion in limiting the scope of review is in accord with decisions of this Court and Other Circuits.....26

CONCLUSION.....31

CASES CITED

Page

Buckhanon v. Percy, 533 F.Supp. 822 (E.D. Wis. 1982).....7, 8, 9, 11 12, 15

Buckhanon v. Percy, 708 F.2d 1209 (7th Cir. 1983).....9, 20, 25, 27

Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981).....14, 16, 17

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).....13, 20

Fern v. Thorp Public School, 532 F.2d 1120 (7th Cir. 1976).....27

Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).....13

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978).....26

Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982).....29

Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320(1980).....14, 15, 17

Milliken v. Bradley, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977).....13

Page

Squillacote v. Local 248,
Meat & Allied Food Workers,
534 F.2d 735 (7th Cir. 1976)....27

Switzerland Cheese Assn., Inc.
v. E. Horne's Market, Inc.,
385 U.S. 23, 87 S.Ct. 193,
17 L.Ed.2d 23 (1966).....26

WISCONSIN REGULATIONS CITED

PW-PA 20.11(3) Wis. Adm. Code....17, 18

UNITED STATES CONSTITUTION

Eleventh Amendment...9, 10, 12, 13, 14,
15, 19, 20, 21, 22,
25, 27, 31

OTHER AUTHORITIES

28 U.S.C. §1292(a)(1).....10, 26, 32

Rule 4(a) Federal Rules of Appellate
Procedure.....23

45 C.F.R. §206.10(a)(5)(i).....18

Omnibus Budget Reconciliation Act
of 1981.....7, 8

STATEMENT OF THE CASE

The Statement of the Case contained in the Petition is not entirely complete or accurate, and respondent adds the following information. This case was filed to challenge the form of notices routinely sent to recipients of Aid to Families with Dependent Children benefits (hereinafter, AFDC), Medical Assistance (hereinafter, MA) and Food Stamps. Buckhanon, 533 F.Supp. at 825 (App. 152). The respondents, plaintiffs below, originally requested that a class be certified consisting of all AFDC, MA and Food Stamp recipients, but the district court certified a class of only those recipients who received notices reducing or terminating their benefits due to implementation of the Omnibus Budget Reconciliation Act (hereinafter, OBRA), as follows:

> All persons in Wisconsin whose AFDC, Food Stamp, and/or Medical Assistance benefits have been or are being reduced or terminated as a result of the implementation of those provisions of the Omnibus Budget Reconciliation Act which are reflected in the foldout and accompanying notices generated by the defendants' December 12, 1981 conversion.

Buckhanon, 533 F. Supp. at 840 (App. 226).

The district court determined that preliminary injunctive relief was appropriate only for certain members of the plaintiff class, namely, those whose benefits were reduced or terminated because of seven specific OBRA provisions. Buckhanon, 533 F.Supp. at 838 (App. 216-217). The district court denied the motion for preliminary injunctive relief on behalf of the other members of the plaintiff class. The district court's January 14, 1982 order also required that benefits be reinstated until adequate

notices were provided the affected members of the plaintiff class. Buckhanon, 533 F.Supp. at 840 (App. 227-228).

The petitioners, defendants below, complied with the order requiring them to issue revised notices to respondents. Buckhanon, 708 F.2d at 1214 (App. 125). Their dispute with respondents now centers on whether the January 14, 1982 order to reinstate benefits required January 1982 benefits to be provided respondents. In a June 1, 1982 order the district court held that the January 14, 1982 order required petitioners to provide January 1982 benefits to respondents (App. 275). The Seventh Circuit affirmed and modified the June 1, 1982 order, holding that the Eleventh Amendment prohibited payment of benefits before January 14, 1982, the date of the preliminary injunction order. Buckhanon, 708 F.2d at 1217 (App. 137-138). No final judgment has been issued.

SUMMARY OF ARGUMENT

Respondents contend that the Petition for a Writ of Certiorari should not be granted because the decision of the Court of Appeals for the Seventh Circuit is consistent with decisions of this Court and the other Circuits in applying the Eleventh Amendment prohibition against retroactive monetary relief. The Seventh Circuit correctly barred monetary relief for the period of time before the date of entry of the district court's order. Respondents contend further that the Petition should not be granted to review the Seventh Circuit's decision not to extend the scope of its review of an interlocutory order under 28 U.S.C. §1292(a)(1) to include an earlier unappealed interlocutory order. The Seventh Circuit carefully exercised its discretion in limiting the scope of its review.

ARGUMENT

I. The Decision Of The Seventh Circuit Does Not Violate The Eleventh Amendment.

A. The decision of the Seventh Circuit correctly interpreted the Eleventh Amendment and decisions of this Court in drawing the line between prospective and retroactive relief.

On January 14, 1982 the district court ordered the petitioners to:

> reinstate to their original level the AFDC, MA, and FS benefits of those members of the plaintiff class whose aid was reduced or terminated as a result of any of [seven OBRA provisions]...until those class members whose aid was reduced or terminated as a result of these OBRA provisions are provided with adequate advance notice of the reasons for the proposed reduction or termination, including sufficient case specific information to inform these recipients of the legal and factual basis of the defendants' proposed actions.

Buckhanon, 533 F.Supp. at 840 (App. 227-228). In response to petitioners' request to clarify this order the district court on June 1, 1982 entered the following order:

> (3) pursuant to the Court's order of January 14, 1982, defendants must pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits;
>
> (4) pursuant to the Court's order of January 14, 1982, defendants must pay for the medical services received by eligible plaintiffs after January 14, 1982;...

(App. 275). In reviewing the June 1, 1982 order, the Seventh Circuit affirmed the award of AFDC and MA benefits to respondents beginning on January 14, 1982. The Seventh Circuit concluded that the Eleventh Amendment prohibited an award of benefits for the period before January 14, 1982. In reaching its decision, the Seventh Circuit drew the line between the prospective and retroactive award of benefits at the date of entry of the district court's order.

The Seventh Circuit's decision is clearly supported by decisions of this Court. In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and Milliken v. Bradley, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) this Court concluded that the Eleventh Amendment prohibits federal courts from awarding retroactive monetary relief to individuals wronged by the state and limits the award of monetary relief to costs necessary to ensure prospective compliance with injunctive orders. In determining what is retroactive relief and what is prospective relief, this Court has held that the date of entry of the district court's order is the dividing line. See, Edelman, Milliken and Fitzpatrick v. Bitzer, 427 U.S. 445, 451, 96 S.Ct. 2666, 2669, 49 L.Ed.2d 614 (1976). In this case, contrary to the assertions of petitioners,

the Seventh Circuit correctly applied the rule set forth by this Court by awarding respondents benefits only for that period of time after the date of the district court's order.

B. The decision of the Seventh Circuit is consistent with decisions in the other circuits and petitioners have shown no conflict among them.

In reaching its decision, the Seventh Circuit found support in the decisions of the Fourth and First Circuits in Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1980), and Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981). In both cases the courts found that the Eleventh Amendment bar against retroactive monetary relief did not prohibit an order requiring state welfare officials to provide Medical

Assistance coverage and AFDC benefits to individuals as a necessary consequence of injunctive relief.

In Kimble, the district court held that the State of Maryland had not complied with adequate notice requirements and, thus, had wrongfully reduced MA benefits. On appeal, the Fourth Circuit concluded that although retroactive relief would be barred, the court could order the state to provide benefits prospectively until the state issued adequate reduction notices.[1]

---

[1]Contrary to the assertion of petitioners, the plaintiff class in this case includes both individuals who received MA benefits because of their AFDC eligibility and individuals who received MA only. See the description of the class certified by the district court, Buckhanon, 533 F.Supp. at 840 (App. 226), and discussion in the Statement of the Case, supra. It is not clear from the Kimble decision whether the class certified there included both individuals receiving MA only and individuals receiving both AFDC and MA. This distinction, however, is not significant for Eleventh Amendment purposes.

In King, the First Circuit issued an injunction pending appeal ordering the Commonwealth of Massachusetts to resume AFDC payments. Petitioners assert that the King decision does not support the Seventh Circuit's decision in this case because the administrative scheme for issuing AFDC checks in Massachusetts differs from that in Wisconsin. Massachusetts issues AFDC benefits in semi-monthly installments; Wisconsin issues the entire monthly benefit at one time. The court in King in a July 13, 1981 order directed Massachusetts to issue the second semi-monthly checks for July. Petitioners' argument assumes that the issuance of two checks per month must mean that AFDC recipients in Massachusetts are also determined eligible on a semi-monthly basis, rather than on a monthly basis as in Wisconsin. There is, however, no

indication in the King decision that this assumption is correct. The more reasonable assumption is that Massachusetts, like Wisconsin, determines AFDC eligibility on a monthly basis and simply pays benefits in two installments, an option also permitted under the Wisconsin administrative scheme. See, PW-PA 20.11(3) Wis. Adm. Code and discussion infra.

The decisions in Kimble and King support the decision in this case.

C. Wisconsin law permits payment of AFDC and/or Medical Assistance benefits at any time during a calendar month and the award of benefits after January 14, 1982 is consistent with state law and the Eleventh Amendment.

The Seventh Circuit concluded that although the State of Wisconsin usually issues benefits at the beginning of the

month it nonetheless had the ability to provide AFDC benefits and Medical Assistance coverage for January 1982 on any day during that month. The court based its conclusion on state administrative rules which require regular on-going benefit determination and issuance throughout the month.

State regulations provide that, in the normal course of events, monthly AFDC checks should be issued by the fifth day of the month. PW-PA 20.11(3) Wis. Adm. Code. This regulation is intended to protect AFDC recipients from irregular patterns of benefit issuance.[2] The Seventh Circuit examined this regulation regarding the

---

[2]Federal regulations require states to provide financial assistance and medical care on a regular on-going basis without delays due to a state's administrative process. 45 C.F.R. §206.10(c)(5)(i). The Wisconsin regulation implements this federal regulation.

time for issuance of AFDC checks and concluded that it was not determinative of where to draw the line between prospective and retroactive relief.

Petitioners argue that the Seventh Circuit should have interpreted this regulation as a bar to an award of any January 1982 benefits, even payment of benefits after the January 14, 1982 district court order. Petitioners assert that the state's liability for all January benefits had already accrued by the time injunctive relief was granted and, thus, any award of monetary relief for January impermissibly disrupts the state's administrative system. In petitioners' view, this disruption is prohibited by the Eleventh Amendment. The Seventh Circuit acknowledged petitioners' argument but concluded that potential disruption of the state's usual pattern of benefit issuance is not the test for distinguishing prospective from retroactive relief:

> Although Wisconsin usually issues checks on the 5th of the month, there is no contention that the Department lacks the authority to do so on the 14th.

Buckhanon, 708 F.2d at 1216 (App. 134-135).

Similarly, the court order in Edelman that Illinois begin to process applications in a timely fashion and provide benefits no later than 30 or 45 days after the date of application to aged, blind and disabled individuals certainly disrupted the state administrative scheme. However, the date for drawing the Eleventh Amendment line is not when the state can most efficiently adjust to its court-imposed obligation. Rather, as this Court has stated, the date to draw the line is the date on which the district court order is entered.

Petitioners' interpretation of where the line should be drawn was properly rejected by the Seventh Circuit.

Petitioners' position would require a court to determine when the administrative mechanism for printing and issuing AFDC checks and MA cards is about to begin, whether it is in the course of being completed, or has, in fact, been completed. In this case, for example, January 1982 AFDC eligibility had already been determined and the checks had been printed by mid-December 1981. (¶6, Stumbras Affidavit, App. 311).[3] January 1982 MA determinations were begun on December 1, 1981 and completed as of December 16, 1981. (¶¶ 10, 11 and 12, Preizler Affidavit, App. 320-322). Therefore, accepting petitioners' analysis that the Eleventh

---

[3]Appendix citations numbered 309 et seq. refer to the appendix submitted with respondents' brief. Respondents have numbered their appendix sequentially to petitioners' appendix.

Amendment line must be drawn so as not to disrupt a state's usual administrative processes, the district court in this case would have had to enter an order before December 1, 1981 in order to affect January 1982 benefits.

The Seventh Circuit correctly refused to apply this analysis, first, because it is not required by the Eleventh Amendment or this Court's decisions and, second, because it imposes an undue burden on district courts and is subject to wide case-by-case variation, depending on the administrative mechanism from state to state. Instead, the Seventh Circuit limited the amount of the state's monetary liability by drawing the Eleventh Amendment line at the date of entry of the district court's order. This is all that is required by the Eleventh Amendment.

II. Appeals From Interlocutory Orders Are Limited Grants Of Jurisdiction And The Seventh Circuit Properly Limited Its Jurisdiction And The Scope Of Review.

A. The Seventh Circuit had no jurisdiction to review an order granting a preliminary injunction which was not appealed within the thirty-day time limit and which petitioners did not include in their notice of appeal, despite the opportunity to do so.

The petitioners have requested this Court to review the Seventh Circuit's decision that an order granting a preliminary injunction is not appealable unless a notice of appeal is filed within 30 days. The Seventh Circuit's decision is firmly grounded in Rule 4(a) of the Federal Rules of Appellate Procedure.

A review of the chronology of events preceding the appeal shows that petitioners made a deliberate decision not to appeal the adequacy of notice issue.

The district court's order granting preliminary injunctive relief was entered on January 14, 1982. No notice of appeal was filed from that order. After January 14, 1982 the petitioners made an oral motion to clarify the January 14, 1982 order; they also filed a written motion to modify the preliminary injunction because some members of the plaintiff class were not provided adequate notice in time to affect February 1982 benefits. (App. 326-329).

The district court's June 1, 1982 decision and order denied petitioners' motion to modify, concluding that federal regulations requiring timely and adequate notices of reduction and termination of public assistance benefits had been violated by petitioners. (App. 273-275). Petitioners' motion to modify the preliminary injunction clearly implicated the adequacy of notice issue addressed in the preliminary injunction order, but

petitioners chose not to include the denial of their motion to modify in their notice of appeal. (App. 324-325). Their notice of appeal listed two of the five orders entered on June 1, 1982, namely, the orders which: (1) required petitioners to pay AFDC benefits for January and (2) required petitioners to pay for medical services after January 14, 1982. (App. 324-325). Petitioners' notice of appeal was clearly limited to only the Eleventh Amendment issue, as the Seventh Circuit noted in its decision. Buckhanon, 708 F.2d at 1214-1215, fn.4 (App. 127).

Because no timely notice of appeal was filed from either the January 14, 1982 preliminary injunction order or the denial of petitioners' motion to modify that order, the Seventh Circuit correctly concluded that it had no jurisdiction to consider the adequacy of notice issue. The only possible basis for the Seventh Circuit to have reviewed the January 14, 1982 order

would have been if that court chose to exercise its discretion and extend the scope of its review of the June 1, 1982 order clarifying the preliminary injunction to include the unappealed order.

B. The Seventh Circuit's careful exercise of its discretion in limiting the scope of review is in accord with decisions of this Court and other circuits.

Petitioners are requesting this Court to review the Seventh Circuit's decision that the scope of review from the June 1, 1982 interlocutory order was limited. It is clear that 28 U.S.C. §1292(a)(1) is a limited exception to the final judgment rule. That provision has been construed narrowly by this Court. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978); Switzerland Cheese Assn., Inc. v. E. Horne's Market, Inc. 385 U.S. 23, 87

S.Ct. 193, 17 L.Ed.2d 23 (1966).

In this case, the Seventh Circuit adhered to the principles established in its earlier decisions which addressed the scope of review question. In Fern v. Thorp Public School, 532 F.2d 1120 (7th Cir. 1976) and Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 750 (7th Cir. 1976) the Seventh Circuit established that determinations regarding the scope of review are relegated to its discretion and that the Seventh Circuit will "apply the rule foreclosing appeal on a pragmatic basis." Buckhanon, 708 F.2d at 1213 (App. 122). The Seventh Circuit did just that in determining that the Eleventh Amendment issue could be reviewed separately from the adequacy of notice issue.

In comparing this case and Fern, the Seventh Circuit determined that in Fern the unappealed preliminary injunction order had obviously been issued in error and the initial failure to appeal was excusable.

In this case it is clear that petitioners had no excuse for failing to appeal either the district court's January 14, 1982 order or the order refusing to modify the preliminary injunction. It was also clear to the Seventh Circuit that the unappealed preliminary injunction order was not based on an obvious error of law or substantial abuse of discretion. The petitioners in fact chose to comply with it rather than appeal. The fact that petitioners had complied with the preliminary injunction and issued revised notices was properly considered by the Seventh Circuit in exercising its discretion not to review the earlier order.

Contrary to the suggestion by petitioners, this approach is entirely consistent with that adopted by the Third Circuit:

> Because section 1292(a)(1) is an exception to an otherwise fundamental rule of federal appellate jurisdiction, we must construe the scope of the provision with great care and circumspection. (emphasis in original)

Kershner v. Mazurkiewicz, 670 F.2d 440, 447 (3d Cir. 1982).

Petitioners have not explained how the Seventh Circuit's exercise of its discretion conflicts with the standard for review of interlocutory orders in the other circuits. In fact, petitioners agree that this question is relegated to the discretion of an appellate court. Their sole argument is that the Seventh Circuit abused its discretion. Abuse of discretion is not a basis on which this Court should grant a petition for certiorari unless the decision to be reviewed so far departs from the accepted course of procedure that this Court must of necessity intervene. The Seventh Circuit pragmatically weighed the

factors in this case before limiting the scope of its review. Therefore, it is not likely that review by this Court could provide any further instruction or definition regarding the parameters of an appellate court's discretion in reviewing interlocutory orders.

CONCLUSION

The Eleventh Amendment prohibition against awarding retroactive benefits to individuals wronged by the state was not violated in this case. The petitioners have not shown any inconsistency between the decision in this case and this Court's rule that the date of the district court's order marks the line between retroactive and prospective relief. Moreover, in drawing the line at the date of the district court's order, the Seventh Circuit reasonably interpreted Wisconsin law. The other circuits which have considered this question have also adhered to this straightforward interpretation of where to draw the line.

Neither should the writ be granted to review the procedural question presented by petitioners regarding the scope of review from an appeal of an interlocutory

INDEX TO RESPONDENTS' APPENDIX

PAGE

AFFIDAVIT OF BERNARD J. STUMBRAS
February 5, 1982
(Exhibit A is not reproduced).....309

AFFIDAVIT OF MARTIN A. PREIZLER
February 5, 1982.....315

NOTICE OF APPEAL
Filed July 1, 1982.....324

NOTICE OF MOTION
February 2, 1982.....326

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

v. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

AFFIDAVIT

STATE OF WISCONSIN)
) SS.
COUNTY OF D A N E)

Bernard J. Stumbras, being duly sworn, says to the court as follows

1. I am Administrator of the Division of Economic Assistance (DEA), Department of Health and Social Services (DHSS) and have been serving in that capacity since July, 1977.

2. DHSS is the single state agency charged with administering the Aid to Families with Dependent Children (AFDC) and Medical Assistnce (MA) programs.

3. DEA is the unit within DHSS responsible for the administration of the AFDC and MA programs.

4. For initial AFDC applications, the local agency enters the information supplied by the applicant into the Computer Reporting Network (CRN). If an AFDC applicant is determined to be eligible by the CRN, the CRN prints a notice of eligibility and the initial AFDC check on the same day the information was entered. The AFDC checks for these applicants are mailed within three (3) to five (5) days of the initial application.

5. If an initial AFDC applicant is found eligible for AFDC benefits, benefits are calculated from the date of application. If application is made on the first of the month and the applicants are eligible as of that date, they will receive a full month's

AFDC payment. If they apply and are eligible later in the month, their benefits are prorated. All subsequent AFDC payments are made on a monthly basis.

6. CRN reviews all available eligibility information for every continuing AFDC recipient on or about the thirteenth day before the end of the month. Pursuant to this review, CRN continues the AFDC grant without change or adjusts or discontinues the AFDC recipients' grants for the subsequent month. The CRN simultaneously prints the appropriate notices and AFDC checks for the subsequent month.

7. AFDC checks for continuing AFDC cases must be issued by the 5th of the month. Section PW-PA 20.11(3), Wis. Adm. Code.

8. In twenty-seven counties, most monthly AFDC checks for continuing AFDC recipients are mailed directly to said recipients by DEA on the last working day of the previous month. These counties are marked with an (x) on Exh. A of this affidavit.

9. In Milwaukee County, most of the monthly AFDC checks for continuing AFDC recipients are mailed directly from Madison to the recipients in the following manner: One-third (1/3) are mailed on the last working day of every month; two-thirds (2/3) are mailed in equal parts on the first and second working days of the month for which payment is intended.

10. In the remaining counties, most of the monthly AFDC checks for continuing AFDC recipients are delivered to the local agency and that agency then mails said checks to

recipients before the fifth of the month for which the payment is intended.

11. In the twenty-seven direct mail counties mentioned in paragraph 7 above, most January, 1982 AFDC checks for continuing AFDC recipients were mailed directly to the recipients on December 31, 1981. (Exhibit A)

12. In Milwaukee County, most January, 1982 AFDC checks for continuing AFDC recipients were mailed on December 31, 1981, January 2 and 3, 1982. (Exhibit A)

13. In counties where the local agency mails the monthly AFDC checks to continuing AFDC recipients, January, 1982 AFDC checks for said recipients were mailed by January 5, 1982. (Exhibit A)

14. In accordance with sec. 49.19(3)(b), Stats. (1979), it is the practice and policy of DHSS to pay AFDC benefits once a month at the beginning of the month.

Dated this 5th day of February, 1982.

/s/ BERNARD J. STUMBRAS
BERNARD J. STUMBRAS, Administrator
Division of Economic Assistance

Subscribed and sworn to before me
this 5th day of February, 1982.

/s/ MARY SOUTHWICK
Notary Public, State of Wisconsin
My Commission: permanent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al,

Plaintiffs,

vs. CIVIL ACTION FILE
No. 81-C-1601

DONALD PERCY, et al,

Defendants.

AFFIDAVIT

State of Wisconsin)
) ss.
County of Dane)

I, MARTIN A. PREIZLER, being first duly sworn, on oath depose and say:

1. That I am an adult resident of the City of Madison, Dane County, Wisconsin, am employed by the State of Wisconsin's Department of Health and Social Services as the Director of the Department's Bureau of Health Care Financing, and have been serving in that capacity since July 31, 1977;

2. That in my capacity as Director of the Bureau of Health Care Financing, I am personally and professionally familiar with the interrelationships between federal, state and county agencies in the determination of entitlement to delivery of and payment for health care services under the Wisconsin Medical Assistance Program and Title XIX of the Social Security Act;

3. That the Department of Health and Social Services is the single state agency designated under §49.45(1), Wis. Stats., to administer the delivery of and payment for health care services to persons eligible to receive benefits under Wisconsin's Medical Assistance Program;

4. That pursuant to §49.45(2)(b)2, Wis. Stats., the Department, on April 9, 1981,

contractually engaged the EDS Federal Corporation, a Texas corporation, to act as the fiscal intermediary for Wisconsin's Medical Assistance Program;

5. That in its capacity as fiscal intermediary, EDS Federal's primary function is to process the payment or denial of all claims submitted by health care providers for services rendered to individuals entitled to receive benefits under Wisconsin's Medical Assistance Program, and that in furtherance of that responsibility, EDS Federal is required to maintain timely and accurate information on all persons currently and previously deemed eligible to receive benefits under Wisconsin's Medical Assistance Program;

6. That EDS Federal is required to maintain a master eligibility file

listing all individuals certified to receive benefits under the Medical Assistance Program, and to monthly prepare and mail Medical Assistance Program eligibility cards to persons that file requests as being entitled to program benefits during the following month;

7. That pursuant to §49.46(1)(a)1, Wis. Stats., any person included in a grant in aid to families with dependent children under §49.19, Wis. Stats., is automatically entitled to receive benefits under Wisconsin's Medical Assistance Program. That determination with respect to a person's entitlement to an AFDC grant is made by the county agency in which that person resides;

8. The Division of Economic Assistance is responsible for notifying EDS Federal of any additions

to or deletions from the master eligibility file which are occasioned by a change in the status of a person's entitlement to AFDC benefits. This is accomplished by the local agency worker entering the individual Medical Assistance case's data into the Computer Reporting Network (CRN). This data is then processed by CRN and a tape is produced. This tape is then placed into the CRN-EDS Federal "interface." This "interface" program converts the CRN data into a new tape which EDS Federal's computer can use. This tape is then flown to Dallas, Texas, EDS Federal's corporate headquarters, where it is used to update the Medical Assistance master eligibility file;

9. That EDS Federal then transmits the new eligibility data to its Madison, Wisconsin office, where

Medical Assistance recipients' cards are printed and mailed;

10. That the procedure described in paragraphs 8 and 9 above is performed daily for persons filing original Medical Assistance applications, persons whose Medical Assistance eligibility status has changed (i.e.: from medically needy to categoricaly needy, or vice versa), or those whose medical assistance eligibility is discontinued. Medical Assistance cards are printed and mailed daily for the first two categories of these individuals. On the third weekend of a month, a major Medical Assistance card print occurs. On that weekend, most of the Medical Assistance cards to be issued for the next month are printed and mailed so that they are received approximately five (5) days before the first day of

the next month. Those Medical Assistance recipients whose Medical Assistance eligibility has been discontinued and whose eligibility data has been processed to EDS Federal in Dallas, Texas, as of the third weekend of a month, do not receive Medical Assistance cards;

11. That the Division of Economic Assistance of the Department of Health and Social Services prepared and delivered on December 15, 1982, to EDS Federal a special conversion tape identifying all deletions to the master eligiblity file occasioned by changes in state and federal laws (Chapter 93, State Laws of 1981, and federal P.L. 97-35, respectively), relating to entitlement to AFDC benefits;

12. That on December 16, 1981, EDS Federal processed the special conversion tape provided it by the

Division of Economic Assistance, and that as a result of said processing, the eligibility of 37,884 individuals was cancelled effective December 31, 1981;

13. That on December 18, 1981, at approximately 6:00 P.M. EDS Federal commenced computer processing efforts to produce Medical Assistance cards for individuals eligible to receive benefits under the Medical Assistance Program during the period January 1 through January 31, 1982. That said processing efforts which encompassed all additions to and deletions from the master eligibility file up to and including December 16, 1982, resulted in the production of 214,796 Medical Assistance identifications cards;

14. That on December 22, 1981, EDS Federal deposited in the United States Mail at Madison, Wisconsin, the

214,746 Medical Assistance cards referred to in paragraph 12;

15. That no Medical Assistance card was produced for, or mailed to any of the 37,884 individuals identified on the special conversion tape prepared by the Division of Economic Assistance and delivered to EDS Federal on December 15, 1981.

/s/ MARTIN A. PREIZLER
Martin A. Preizler
Director, Bureau of Health Care Financing
Department of Health and Social Services

Subscribed and sworn to before me
on this 5th day of February, 1982.

/s/ JEAN E. GILPIN
Notary Public, State of Wisconsin
My Commission is Permanent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

v. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

NOTICE OF APPEAL

The defendants, Donald E. Percy, Bernard J. Stumbras and Kenneth Rentmeester, hereby appeal to the United States Court of Appeals for the Seventh Circuit from two separate orders entered in this action on June 1, 1982, issued in response to defendant's oral motion to clarify a preliminary injuntion which orders:

1.) require defendants to pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits; and

2.) Defendants to pay for medical services (medical assistance) received by eligible plaintiffs after January 14, 1982.

Dated at Madison, Wisconsin this 1st day of July, 1982.

BRONSON C. LA FOLLETTE
Attorney General

/s/ F. THOMAS CREERON III
F. THOMAS CREERON III
Assistant Attorney General

Attorneys for Defendants

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

v. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

NOTICE OF MOTION

TO: Mary Fisher Bernet
Anne L. DeLeo
Legal Action of Wisconsin, Inc.
326 West Brown Street
Milwaukee, Wisconsin 53212
Attorneys for Plaintiffs

PLEASE TAKE NOTICE that defendants, by their attorneys, Bronson C. La Follette, Attorney General and Waltraud A. Arts, Assistant Attorney General, will move the court, the Honorable Robert W. Warren, presiding, at the Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, at a date and

time to be set by the court, for an order modifying the terms of the permanent injunction issued on January 14, 1982, in accordance with the following motion:

MOTION TO MODIFY THE
PRELIMINARY INJUNCTION IN REGARD
TO THE 150% GROSS INCOME TEST

NOW COME the defendants, by their attorneys, Bronson C. La Follette, Attorney General and Waltraud A. Arts, Assistant Attorney General, and move the court for relief from the permanent injunction issued on January 14, 1982, in regard to the plaintiffs whose AFDC and/or MA benefits were terminated for February, 1982, due to the application of the OBRA 150% gross income test. The defendants request relief from the portion of the order which requires them to reinstate the plaintiffs' AFDC

and MA benefits until they can be given adequate advance notice of the reasons for the proposed reduction or termination.

This motion is based on the facts set forth in the affidavit of Bernard Stumbras filed herewith. Briefly, a programming error resulted in the notice approved by the court on January 20, 1982, being mailed to the county agency, rather than directly to the plaintiffs affected by the 150% gross income test. The county agencies have forwarded the notices to the plaintiffs.

The defendants request the court modify the injunction in regard to these plaintiffs by requiring the defendants to send the plaintiffs affected a notice that their hearing rights are extended as a result of the

error, but relieving the defendants from reinstating their AFDC and/or MA benefits for February, 1982, since the defendants acted in good faith in attempting to provide adequate and timely notice to these plaintiffs.

Dated this 2nd day of February, 1982.

BRONSON C. LA FOLLETTE
Attorney General

/s/ WALTRAUD A. ARTS
WALTRAUD A. ARTS
Assistant Attorney General

Attorneys for Defendants

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707
608/266-0431